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Dueling Monologues on the Public Domain: What Digital Copyright Can Learn from Antitrust

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Cover Page Footnote

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Timothy K. Armstrong

Abstract

This article, written for the inaugural volume of the *University of Cincinnati Intellectual Property and Computer Law Journal*, explores the disconnect between contemporary United States intellectual property law and the often quite different consensus views of disinterested expert opinion. Questions concerning how copyright law treats the public domain (that is, uncopyrighted material) supply a lens for comparing the law as it stands with the law as scholars have suggested it should be. The ultimate goal is to understand why a quarter century of predominantly critical scholarship on intellectual property seems to have exerted such limited influence on Congress and the courts. Comparing recent copyright history with the dramatic shift in federal antitrust law that occurred during the last four decades in response to academic criticism from the law-and-economics movement, this article asks whether today's would-be copyright reformers have anything to learn from the transformation of antitrust law.

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The fact is that no other . . . statute has been subjected to so steady a barrage of hostile commentary . . . Indeed, the scholarly and professional literature on the statute resembles a cascade of vituperation.

—Robert H. Bork¹

I. Introduction

Judge Bork was talking about the Robinson-Patman Act,² not the Digital Millennium Copyright Act (DMCA).³ Nevertheless, Bork's palpable frustration that Congress has suffered such ill-conceived legislation to exist surely resonates with many contemporary copyright scholars. A rich copyright literature has emerged over the last generation that emphasizes the importance of enforcing reasonable limits on copyright's exclusive rights in order to spur creative output and foster technological innovation. Copyright scholars could be forgiven for asking, however, whether anyone is listening. Judges have said they find little value in academic writings.⁴ The courts have issued decisions that simply fail to engage with the relevant research.⁵ And frustration over the inability to alter the frame of the debate has driven one of its best-known scholars, Professor Lawrence Lessig, from the copyright field entirely.⁶

¹ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 385 (1978). Although most widely remembered today for his failed nomination to the Supreme Court in 1987, the late Judge Bork was for many years a scholar of antitrust law, whose *The Antitrust Paradox* is rightly regarded as a seminal work in the field. See William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413 (1990), reprinted in *EVOLUTION OF ANTITRUST POLICY FROM JOHNSON TO BUSH* 275 (Robert F. Himmelberg, ed., 1994).

² Act of June 19, 1936, ch. 592, § 1, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13a–13b).

³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in relevant part at 17 U.S.C. §§ 1201–1205).

⁴ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). On the other hand, other judges believe that locating pertinent sources in the scholarly literature is indispensable to sound decision-making. See John Minor Wisdom, *Wisdom's Idiosyncrasies*, 109 YALE L.J. 1273, 1278 (2000) (recommending that judges and law clerks proactively seek out law review articles on point).

⁵ See *infra* notes 275–302 and accompanying text.

⁶ See LAWRENCE LESSIG, *REPUBLIC, LOST* xii–xiii (2011). In 2008, copyright expert William Patry, author of the *Patry on Copyright* treatise, made a similar point when he announced the end of his popular copyright blog:

I regard myself as a centrist. I believe very much that in proper doses copyright is essential for certain classes of works, especially commercial movies, commercial sound recordings, and commercial books, the core copyright industries But in my view, . . . we are well past the healthy dose stage and into the serious illness stage [T]hings are getting worse, not better [T]he most important stories are too often ones that involve initiatives that are, in my opinion, seriously harmful to the public interest. I cannot continue to be so negative, so often. Being so negative, while deserved on the merits, gives a distorted perspective of my centrist views, and is emotionally a downer.

In antitrust law, however, Judge Bork and his compatriots conquered the world. What began as an insurgent intellectual movement challenging a reigning orthodoxy spread outwards from the University of Chicago until it ultimately displaced the incumbent legal regime. This recent transformation of antitrust law in response to earlier academic criticism may supply a template for today's would-be copyright reformers. At the very least, comparing some of the attributes of a law reform movement that was, on its own terms, successful (whatever one's view of the merits of the resulting legal regime) with the attributes of a reform movement that has so far struggled to produce a lasting impact on policy may yield useful insights for transformative legal projects across a variety of subject matter domains.

Part II of this article considers the profound reorientation of United States antitrust law along the lines sketched out by commentators affiliated with the so-called "Chicago School" of law and economic analysis. The article examines how the Chicago School's academic critique of existing legal rules began to influence, and ultimately to displace, those very rules. The Chicago School's influence is easily traced through a series of court decisions showing the gradual acceptance of arguments based on principles of neoclassical microeconomics.

In Part III, the terrain shifts from antitrust law to copyright law and the time frame advances by few decades. The article summarizes, in broad terms, a related family of criticisms of copyright law that took root in the legal academy and elsewhere in the mid-1990s, primarily in response to perceived legislative and judicial overreach. The sketch of this critical copyright literature, and the reform movement that it produced, is necessarily incomplete due to the ongoing nature of the reform efforts, the lack of political or organizational cohesion among many of the persons most prominently identified with the movement, and the diversity of opinion both as to the most salient problems and the contours of proposed solutions.

Part IV continues by assessing the record of copyright reformist arguments in the courts to date. The contrast with antitrust is an unhappy one. In case after case, reformist arguments have been rebuffed or simply ignored. To be sure, the story is not uniformly bad for would-be copyright reformers; glimmers of more hospitable judicial attitudes appear from time to time and statements supporting reformist policy have occasionally emerged from unlikely quarters. But on the whole, the record is discouraging.

Part V seeks to connect the discussions in the preceding sections by asking what conditions underlay the earlier transformation of antitrust law and whether it is possible to borrow and replicate some of those conditions to transform digital copyright law. The goal here is not exhaustively to catalog the necessary measures that copyright reformers might embrace, but only to suggest possible directions for further conversation and advocacy.

William Patry, *End of the Blog* (Aug. 1, 2008), at <http://williampatry.blogspot.com/2008/08/end-of-blog.html>.

II. Origins and Evolution of Antitrust Doctrine

Federal antitrust policy⁷ in the United States rests upon a series of extremely terse statutes. Section 1 of the Sherman Antitrust Act⁸ outlaws “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations[.]”⁹ Section 2 of the same statute forbids “monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of” interstate or foreign commerce.¹⁰ Section 7 of the Clayton Act¹¹ forbids corporate mergers and acquisitions “where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.”¹² And the Federal Trade Commission Act¹³ declares “unfair methods of competition in or affecting commerce, and unfair acts or practices in or affecting commerce” to be unlawful.¹⁴ In consequence of the breadth, generality, and brevity of the governing statutes, virtually the entirety of substantive United States antitrust law is judge-made,¹⁵ its contours shaped by the ebb and flow of judicial thinking over time.

The 1960s and ensuing decades witnessed a transformation in antitrust law driven by changes in judicial attitudes rather than statutory revision. These changes in judicial doctrine, in turn, were influenced by changes in academic thinking about economic regulation in general and

⁷ Largely for historical reasons, the body of law universally known elsewhere as “competition law” is referred to as “antitrust” in the United States. *See, e.g.*, RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW (rev. ed. 1996).

⁸ An act to protect trade and commerce against unlawful restraints and monopolies, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

⁹ 15 U.S.C. § 1 (2012).

¹⁰ *Id.* § 2.

¹¹ An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27).

¹² 15 U.S.C. § 18 (2012). Although as originally enacted this provision of the Clayton Act forbade only anticompetitive mergers via stock acquisition, Congress later expanded its scope to include anticompetitive acquisition of another firm’s assets as well. *See* Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950).

¹³ An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

¹⁴ 15 U.S.C. § 45(a)(1) (2012).

¹⁵ For students not versed in antitrust principles, the best analogy may be to copyright law’s fair use doctrine, which places a minimum of statutory scaffolding, 17 U.S.C. § 107 (2012), under a highly complex set of judge-made tests and rules; the primary difference being that antitrust law relies equally on judge-made rules to define what conduct constitutes an antitrust violation in the first instance, not merely what conduct may constitute a defense to liability.

competition policy in particular.¹⁶ Without attempting to catalog exhaustively the changes in antitrust doctrine over the last few decades, it is worthwhile at least to trace the broadest outlines of the path the law has charted.

Almost since the passage of the Sherman Act, the Supreme Court has recognized that not every restraint of trade threatens the harm that prompted Congress to act. Virtually from its inception, therefore, United States antitrust law has drawn a dividing line between those commercial activities deemed illegal *per se*—meaning, categorically forbidden in every instance—and those whose legality may be determined only upon a fact-specific inquiry into competitive effects, using what has become known as the “rule of reason.” In the Court’s words:

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are “illegal *per se*.” In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.¹⁷

Much of the evolution in antitrust thinking during the past generation has resulted from courts changing, in response to developments in the scholarly literature, which mode of analysis they apply to particular challenged arrangements, the *per se* rule or rule-of-reason analysis. As discussed below, the trend has been in the direction of greater reliance on the rule of reason, with a pronounced reduction in the types of cases deemed appropriate for *per se* rules. Because rule-of-reason analysis differs from the *per se* approach in its reliance upon proof of particular market effects, it naturally invited further development of an academic and professional literature on those topics. Faced with an expanding body of economic literature purporting to illuminate the likely competitive effects of various business arrangements, the courts responded by changing the law to make that literature relevant.

In the first eight decades following the enactment of the Sherman Act, the courts identified a wide variety of business practices that constituted *per se* violations of the antitrust laws.¹⁸ Then-Circuit Judge Taft declared horizontal price-fixing agreements among competitors

¹⁶ A brief but accessible overview of this evolution in antitrust doctrine is available in Nolan Ezra Clark, *The Future of Antitrust Enforcement*, 31 ANTITRUST BULL. 401 (1986).

¹⁷ *National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978). On the development and evolution of “rule-of-reason” analysis in antitrust cases, see generally *id.* at 686–91. See also *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

¹⁸ The discussion that follows purposefully elides a substantial portion of the complexity of antitrust development, such as statutory enactments subsequent to the Clayton and FTC Acts, and the many cases that qualified or limited some of the doctrines the Supreme Court announced in the cases cited in this paragraph. My purpose herein is not to provide a grounding, however rudimentary, in the substantive law of antitrust (a topic in which I claim no special expertise), but rather to state the basis for the discussion that follows concerning the

to be illegal in *United States v. Addyston Pipe & Steel Co.*¹⁹ The formation of a holding company designed to control the stock of two or more former competitors—the classic “trust” arrangement—was categorically outlawed in *Northern Securities Co. v. United States*.²⁰ Resale price maintenance agreements—contracts imposed by a manufacturer on its distributors requiring them to resell the manufacturer’s products at or above a specified price, or else lose their distributorship—were declared illegal in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*²¹ So-called “tying” arrangements, which conditioned a consumer’s purchase of a desired product upon the consumer’s agreement to also purchase a second (possibly undesired) product, were outlawed in *United Shoe Machinery Corp. v. United States*.²² Group boycotts or concerted refusals to deal, in which two or more competitors refuse to do business with an upstream producer or downstream customer unless the producer or customer ceases to do business with a competitor of the group, were outlawed in *Fashion Originators’ Guild v. FTC*.²³ Agreements among competitors to divide markets along territorial lines were forbidden in *Timken Roller Bearing Co. v. United States*.²⁴ And vertical non-price restraints, such as agreements imposed by a manufacturer forbidding its dealers to carry competing products, were declared unlawful in *United States v. Arnold, Schwinn & Co.*²⁵

Even outside the universe of *per se* unlawful restraints of trade, other elements of antitrust jurisprudence as it existed before the late 20th century appear as historical anachronisms to contemporary eyes. In *Brown Shoe Co. v. United States*,²⁶ for example, the Supreme Court condemned on antitrust grounds a merger of two corporations who controlled relatively

transformation of antitrust law in response to economic criticism. To borrow a metaphor, the actual substantive rules of antitrust law are the chessmen on a board, and my interest lies neither in where they began nor where they ended up so much as in how they came to be moved during the game.

¹⁹ 85 F. 271, 291–301 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899). *See also, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396–401 (1927).

²⁰ 193 U.S. 197 (1904). The Court specifically emphasized that, in its view, the Sherman Act outlawed “every combination or conspiracy which would extinguish competition between otherwise competing railroads” and was “not limited to restraints of . . . trade or commerce that are unreasonable in their nature[.]” *Id.* at 331 (emphasis in original).

²¹ 220 U.S. 373 (1911). *See also, e.g.*, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45–47 (1960).

²² 258 U.S. 451, 457–58 (1922). *See also, e.g.*, *United States v. Loew’s Inc.*, 371 U.S. 38 (1962); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

²³ 312 U.S. 457 (1941).

²⁴ 341 U.S. 593 (1951).

²⁵ 388 U.S. 365 (1967).

²⁶ 370 U.S. 294 (1962).

minuscule shares of the market in which they competed.²⁷ Even corporate mergers that promised to yield greater efficiencies that would ultimately lead to lower consumer prices were invalidated essentially on the grounds that Congress preferred two competitors to one.²⁸

Antitrust law in this era was hardly divorced from economics. To the contrary, then-prevailing economic theory maintained that industries characterized by a highly concentrated structure with few competitors tended to underperform more competitive industries.²⁹ Backed by supportive economic theory and by exhortations from the Supreme Court, federal antitrust enforcers embarked on lengthy litigation campaigns aimed at fundamentally restructuring key domestic industries, including landmark cases against AT&T³⁰ and IBM.³¹

Nevertheless, this entire edifice came under sustained attack from the new “Chicago School” strand of neoclassical economic theory beginning around the 1960s, with the volume of criticism rising steadily over the two to three decades that followed.³² Nowhere was the criticism sharper than with respect to the Court’s treatment of vertical restraints—agreements between parties at different levels in the distribution chain, such as manufacturers and distributors.³³ As early as 1960, for example, the *Dr. Miles* decision’s categorical prohibition of resale price maintenance had been attacked by economists, who argued that the practice could have pro-

²⁷ The acquiring company, Brown, held approximately 4% of the United States retail market for shoes; the acquired company, Kinney, held approximately 1.6%. *Id.* at 303.

²⁸ See Federal Trade Comm’n v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (“Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”) (citing *Brown Shoe*); United States v. Von’s Grocery Co., 384 U.S. 270, 275 (1966) (describing “basic purpose” of the antitrust laws as “to prevent concentration in the American economy by keeping a large number of small competitors in business”) (footnote omitted).

²⁹ See, e.g., F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 4 (2d ed. 1980). For economic analyses of some of the types of conduct then condemned as *per se* violations of the antitrust laws, see, e.g., Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

³⁰ The AT&T litigation lasted over three decades and led ultimately to the company’s divestiture of its regional subsidiaries, the so-called “Baby Bells,” that provided local telephone service. See *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982).

³¹ The IBM litigation lasted for thirteen years before being effectively dropped during the first Reagan Administration. See *In re International Business Machines Corp.*, 687 F.2d 591 (2d Cir. 1982).

³² See, e.g., Thomas E. Kauper, *The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 329, 331 (1968) (complaining that Warren-era antitrust decisions appeared to rest upon “a peculiar blend of modern economic theory and Populism” and that “[t]he growing body of economic knowledge concerning the effects of vertical integration, resale price maintenance, territorial and other restrictions on distributors, and tying arrangements have been virtually ignored.”); Jerrold G. van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964) (arguing that courts should limit application of rules of *per se* illegality).

³³ See *supra* notes 21, 22, 23, 25 and accompanying text.

consumer consequences.³⁴ The *per se* prohibition against tying arrangements was criticized by economists who noted that essentially the same economic results could be achieved through vertical integration, a practice not subject to the *per se* rule.³⁵ Group boycotts or concerted refusals to deal, some argued, might be pursued for a variety of reasons only some of which resulted in the lessening of competition in the market and were therefore likewise inappropriate for *per se* condemnation.³⁶ Similarly, restrictions on distribution and other non-price vertical restraints were judged by some observers to be too varied in their effects from one case to another to justify their absolute prohibition under a *per se* rule.³⁷ Indeed, because pro-consumer effects of vertical restraints were likely to predominate in most circumstances, Bork went so far as to argue that “every vertical restraint should be completely lawful.”³⁸

The law’s treatment of horizontal restraints, too, came in for substantial criticism. The *per se* rule against price-fixing and other agreements among competitors, some argued, swept too broadly, forbidding at least some pro-consumer arrangements³⁹ and slowing the pace of cooperative innovation.⁴⁰ The Court’s sweeping condemnation of horizontal mergers even in the

³⁴ See Lester G. Tesler, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (Oct. 1960); see also, e.g., Thomas W. Gilligan, *The Competitive Effects of Resale Price Maintenance*, 17 RAND J. ECON. 544 (1986); Frederick R. Warren-Boulton, *Resale Price Maintenance Re-examined: Monsanto v. Spray-Rite (1984)*, in THE ANTITRUST REVOLUTION 364 (John E. Kwoka, Jr. & Lawrence J. White, eds., 3d ed. 1999).

³⁵ See Roger D. Blair & David L. Kaserman, *Vertical Integration, Tying, and Antitrust Policy*, 68 AM. ECON. REV. 397, 400–01 (1978) (arguing for rule-of-reason treatment of both tying arrangements and vertical integration). See also, e.g., Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & ECON. 345 (1985).

³⁶ See Joseph P. Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); C. Coleman Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247.

³⁷ See Almarin Phillips, *Schwinn Rules and the “New Economics” of Vertical Relations*, 44 ANTITRUST L.J. 573 (1975); Earl E. Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 ANTITRUST L.J. 557 (1975).

³⁸ BORK, *supra* note 1, at 288.

³⁹ See Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 429–65 (1966).

⁴⁰ See Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 ANTITRUST L.J. 579 (1993). In an era when the United States was particularly sensitive to the perceived risk of losing ground in the innovative arena to foreign (and, especially, Japanese) competition, suggestions that the antitrust laws were hampering economically necessary forms of cooperation among American firms drew swift legislative responses. See, e.g., National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (1984); National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, 107 Stat. 117 (1993).

face of evidence that post-merger scale economies and efficiency gains would result in lower prices⁴¹ was criticized as inherently inimical to consumer welfare.⁴²

In response to these criticisms, the law began to change. Just ten years after declaring distribution restrictions and other vertical non-price restraints to be illegal *per se* in the *Schwinn* case,⁴³ the Supreme Court reversed course, holding in *Continental TV, Inc. v. GTE Sylvania Inc.* that such restrictions could be lawful under rule-of-reason analysis.⁴⁴ The *GTE Sylvania* Court noted that “[t]he great weight of scholarly opinion ha[d] been critical of” its prior decision in *Schwinn*, which had caused “continuing controversy and confusion, both in the scholarly journals and in the federal courts.”⁴⁵ The Court then considered the teachings of economic literature on vertical non-price restraints such as those at issue. Noting that previous cases applying *per se* rules of antitrust liability had presumed that the challenged conduct was inherently pernicious, the Court found such a presumption inappropriate where vertical restraints were involved “because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.”⁴⁶ Because “[e]conomists ha[d] identified a number of ways in which manufacturers can use such [vertical] restrictions to compete more effectively against other manufacturers,”⁴⁷ the Court concluded, “the *per se* rule stated in *Schwinn* must be overruled.”⁴⁸

As summarized above, many other rules of *per se* antitrust liability had grown up over the decades before *GTE Sylvania*.⁴⁹ Within thirty years after *GTE Sylvania*, however, most of those precedents would be overruled or substantially narrowed. In 1988, the Court effectively extended *GTE Sylvania* by mandating rule-of-reason analysis for all vertical restraints that did not incorporate agreements on prices or price levels.⁵⁰ In 1997, the Court held that vertical maximum

⁴¹ See *supra* note 28 and accompanying text.

⁴² See Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 305–06 (1975) (criticizing Supreme Court’s *Brown Shoe* decision for outlawing a merger based on fears that the merged firm would charge lower, rather than higher, prices).

⁴³ See *supra* note 25 and accompanying text.

⁴⁴ 433 U.S. 36 (1977).

⁴⁵ *Id.* at 47–48.

⁴⁶ *Id.* at 51 (footnotes omitted); see also *id.* at 51 n.18 (discussing academic literature on market effects of vertical restraints); *id.* at 69–70 & n.10 (White, J., concurring) (same).

⁴⁷ *Id.* at 54–55.

⁴⁸ *Id.* at 58.

⁴⁹ See *supra* notes 18–28 and accompanying text.

⁵⁰ See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735–36 (1988).

price-fixing arrangements must be evaluated under the rule of reason.⁵¹ A decade later, with extensive citations to economic literature, the Court mandated rule-of-reason analysis for minimum resale price maintenance agreements as well.⁵²

Without formally overruling its precedents declaring tying arrangements to constitute a *per se* antitrust violation,⁵³ the Supreme Court effectively retreated from a *per se* rule beginning in 1977 by requiring plaintiffs to demonstrate market power and competitive harm from the defendant's conduct, ordinarily components of a rule-of-reason analysis.⁵⁴ Even horizontal agreements among competitors, the Court recognized in 1984, could be evaluated under the rule of reason where "horizontal restraints on competition are essential if the product is to be available at all."⁵⁵ The Court applied rule-of-reason analysis to concerted refusals to deal during the 1980s,⁵⁶ although it retreated from those rulings (over a vigorous dissent) a few years later.⁵⁷ The Court also ruled that horizontal mergers could not be attacked on the grounds that they would yield lower, rather than higher, consumer prices.⁵⁸ The Supreme Court, moreover, held that a plaintiff's complaint alleging an antitrust violation could not even proceed beyond the

⁵¹ See *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 149 (1968)). The courts' historic *per se* condemnation of price-fixing, see *supra* note 19 and accompanying text, survives today only as regards horizontal price-fixing between competitors, see *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342–55 (1982), although even this rule may now be open to doubt: *Maricopa* relied for its *per se* rule partly on the Court's reasoning in *Albrecht* (see 457 U.S. at 347), and *Albrecht* has since been overruled by *Khan*.

⁵² See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–99 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

⁵³ See *supra* note 22 and accompanying text.

⁵⁴ See, e.g., *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (requiring inquiry into "probability of anticompetitive consequences" from challenged tying arrangement); *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620 (1977) (requiring proof of market power). See generally *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 33–39 (2006) (reviewing history of Court's tying jurisprudence and noting several steps the Court had taken to weaken *per se* condemnation of tying arrangements); *id.* at 43 (condemnation of tying arrangement "must be supported by proof of power in the relevant market rather than by a mere presumption thereof") (footnote omitted).

⁵⁵ *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 101 (1984).

⁵⁶ See *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293–98 (1985).

⁵⁷ Compare *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (applying *per se* rule to group boycott), with *id.* at 438–46 (Brennan, J., concurring in part and dissenting in part) (arguing against *per se* condemnation of group boycotts that involve an expressive component).

⁵⁸ See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 114–17 (1986). The Court signaled its retreat from the principles it had described as animating the antitrust laws two decades earlier, noting that there was now "considerable disagreement" whether the antitrust laws should be so construed as to "keep small competitors in business at the expense of efficiency." *Id.* at 116 n.11; cf. *supra* note 28 and accompanying text.

pleading stage if economic theory suggested reasonable grounds for the defendants to engage in the actions alleged.⁵⁹

By the first decade of the 21st century, the transformation was complete: what had originated as the Chicago School's critique of antitrust law had itself become the law. Judge Posner introduced a new edition of his book *Antitrust Law* by trumpeting the fact that Chicago-School economic analysis and the substantive law of antitrust had melded together so thoroughly that it no longer made sense to speak of the two as distinct:

The first edition of this book, published a quarter of a century ago, bore the subtitle "An Economic Perspective," implying there were other perspectives. . . . In the intervening years, the other perspectives have largely fallen away, a change that I have marked by dropping the subtitle from this new edition.⁶⁰

III. The Public Domain in Copyright Law

The public domain lies outside the borders of intellectual property:⁶¹ it contains material not protected by a copyright, patent, or other intellectual property right⁶² and therefore "free as the air to common use."⁶³ The public domain constitutes a special form of what economists

⁵⁹ See *Bell Atlantic Co. v. Twombly*, 550 U.S. 544 (2007).

⁶⁰ RICHARD A. POSNER, *ANTITRUST LAW* vii (2d ed. 2001) (footnote omitted); see also *id.* at ix ("Almost everyone professionally involved in antitrust today—whether as litigator, prosecutor, judge, academic, or informed observer—not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal."); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* v (1994) ("Today the union of antitrust and economics is so complete that one cannot study antitrust seriously without at least some exposure to economics.").

⁶¹ See James Boyle, *Foreword: The Opposite of Property?*, 66 *LAW & CONTEMP. PROBS.* 1, 1 (2003).

⁶² See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237–38 (1964). This is perhaps the most common understanding of the term "public domain"; however, as discussed below, other ways of identifying the public domain exist. To take only one example, uncopyrightable elements within an otherwise protected work—such as individual facts within an original factual compilation, or functional components within a computer program—may be freely reused by others and are therefore in some sense a part of the public domain as well, notwithstanding that the work in which they appeared is subject to copyright protection. See, e.g., *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 359 (1991) (recognizing that uncopyrightable facts remain free to copy even after being incorporated into a potentially copyrightable compilation); *Stewart v. Abend*, 495 U.S. 207, 234 (1990) (recognizing that addition of copyrightable material to public domain story elements does not confer copyright ownership over those story elements); *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992) ("material found in the public domain . . . is free for the taking and cannot be appropriated by a single author even though it is included in a copyrighted work").

⁶³ *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting); see also, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003) ("once the patent or

recognize as a “commons,” a zone from which no economic actor has a right to exclude others.⁶⁴ Material formerly protected by an intellectual property right may enter the public domain through expiration of the statutory term of protection (in the case of copyrights and patents),⁶⁵ through the owner’s noncompliance with a legal condition required for protection,⁶⁶ or through the owner’s voluntary relinquishment of rights.⁶⁷ The public domain also includes material statutorily defined as ineligible for intellectual property protection such as federal government works.⁶⁸

Because the public domain consists of material outside the coverage of copyright, changes in copyright law’s outer boundaries over time necessarily affect the content of the public domain.⁶⁹ For example, legislative extensions of the copyright term slow the entry of copyrighted works into the public domain.⁷⁰ Similarly, because the existence of copyright rights

copyright monopoly has expired, the public may use the invention or work at will and without attribution”); *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001) (“In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying.”); *Lear, Inc. v. Adkins*, 395 U.S. 653, 674 (1969) (noting “the strong federal policy favoring the full and free use of ideas in the public domain”).

⁶⁴ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY* 14–15 (2003). The analogy to commonses in traditional property nomenclature is necessarily inexact because the nonrivalrous character of intellectual property goods prevents “intellectual commonses” from becoming depleted through overuse. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 47–49 (2008).

⁶⁵ See 17 U.S.C. §§ 302–304 (2012) (specifying duration of copyright protection); 35 U.S.C. § 154 (2012) (specifying duration of patent protection).

⁶⁶ See 35 U.S.C. § 102 (2006 & Supp. V 2011) (certain disclosures made by the inventor more than one year before filing of application for patent may bar issuance of patent).

⁶⁷ Doctrines of abandonment have been developed by the courts in respect of most of the varieties of intellectual property. See, e.g., *Baglin v. Cusenier Co.*, 221 U.S. 580, 597–98 (1911) (trademark); *Pennock v. Dialogue*, 27 U.S. 1, 16 (1829) (patent); *National Comics Publications v. Fawcett Publications*, 191 F.2d 594, 598 (2d Cir. 1951) (copyright).

⁶⁸ See 17 U.S.C. § 105 (2012); see also *infra* note 98 and accompanying text.

⁶⁹ This is so, at least, with respect to the most common understanding of the term “public domain” as a reference to works currently unprotected by copyright; in this limited respect (even if not in others) it does indeed make sense to understand the public domain “as a kind of zero sum game.” Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 825 (2006) (discussing evolution in Professor David Lange’s views over the course of his scholarship on the public domain). Enlarging our understanding of what constitutes the public domain necessarily complicates this binary picture; for example, virtually every copyrighted work adds to the effective public domain at least a bit by the contribution thereto of its own unprotectable elements. See *supra* note 62 and authorities cited (noting the lack of copyright protection for certain elements within copyrighted works); Samuelson, *supra*, at 825 & nn.207–08 (recognizing expansion of public domain by unprotectable elements of copyrighted works).

⁷⁰ See *Eldred v. Ashcroft*, 537 U.S. 186, 241 (2003) (Stevens, J., dissenting); L. Ray Patterson, *What’s Wrong with Eldred?: An Essay on Copyright Jurisprudence*, 10 J. INTEL. PROP. L. 345, 348 (2003).

depends on legislative recognition,⁷¹ the creation by Congress of new exclusive copyright rights⁷² necessarily withdraws from the public the ability to engage in such uses without a license, and Congress's extension of copyright protection to new subject matter⁷³ likewise ends the public's freedom to use such works without authorization.

This inverse relationship between the scope of copyright protection and the scope of the public domain has become ever more important precisely because copyright has grown: copyright now covers broader subject matter, provides more types of exclusive rights, and lasts longer than ever.⁷⁴ As copyright has expanded, the domain of material available for free public use has correspondingly shrunk. Successive restrictions on the public domain, in turn, have sparked growing interest among copyright scholars in the purposes and functions of the public domain.

A. The Public Domain in Copyright Discourse

An outpouring of copyright scholarship over the last generation has examined in considerable depth the purposes served by the public domain. The overall effect has been to relocate the public domain from the periphery of copyright policy, of interest only as an abstract or theoretical matter, to a position much nearer its core. Without attempting to catalog this voluminous literature in anything approaching an exhaustive scope, some of the more compelling strands of scholarly research concerning the importance of the public domain may be briefly summarized.

Professor Pamela Samuelson has noted that intellectual property scholars apply the label "public domain" in a bewildering variety of ways.⁷⁵ This multiplicity of understandings, she

⁷¹ See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) (recognizing that copyright legislation "instead of sanctioning an existing right . . . created it.").

⁷² See, e.g., *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001) (recognizing formal legislative protection for authors' rights to create derivative works in Copyright Act of 1909); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2(3), 109 Stat. 336, 336 (1995) (codified at 17 U.S.C. § 106(6) (2012)) (creating right for public performance via digital audio transmission); Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863–76 (1998) (codified at 17 U.S.C. §§ 1201–1205 (2012)) (creating rights against circumvention of technological protection measures and alteration of copyright management information).

⁷³ See, e.g., Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. VII, 104 Stat. 5089, 5133–34 (1990) (architectural works); Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028–29 (1980) (software).

⁷⁴ See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 977–993 (1990) (tracing expansion of subject matter coverage and exclusive rights provided under copyright statutes from 1790 to 1976 alongside judicial doctrines that generally served to exclude portions of works from protection). On the history of legislative expansions of the duration of copyright protection, see generally *Eldred*, 537 U.S. at 194–96.

⁷⁵ See Samuelson, *supra* note 69, at 789–813 (enumerating thirteen conceptually distinct uses of the term in intellectual property literature); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 151 fig. 1 (2003) (representing multiple common understandings of the content of

argues, is valuable insofar as it permits recognition of a wider variety of social values served by each of the different “public domains” that scholars have identified.⁷⁶ The multiple uses of the term “public domain,” however, can also cloud understanding by introducing uncertainty at just the point where clarity is most needed: to wit, in determining whether a particular use of a particular work poses legal risk.⁷⁷ Without discounting the benefits of the broader conceptions Professor Samuelson describes, it makes some sense to focus attention herein on the more limited universe of works the use of which involves no risk of legal liability to the user and to explore the benefits that have been articulated for the availability of such works.

1. As a source of the raw materials of creation

Professor Jessica Litman’s celebrated article *The Public Domain*⁷⁸ articulates one of the most frequently invoked justifications for defending the public domain against encroachment by proprietary claims: namely, that the public domain supplies the reservoir of creative and expressive materials upon which authors draw to create new works. Authorship, on this view, does not occur *ex nihilo*, but rather represents an iterative, incremental exercise building upon a shared commons of cultural antecedents.⁷⁹ An author’s ability to reuse those public-domain antecedents without legal risk, the argument goes, itself spurs the creation of new works.⁸⁰

In a similar vein, Professor James Boyle rejects, as a “powerful (and historically contingent) stereotype,” the “romantic vision of authorship, of the genius whose style forever expresses a single unique persona.”⁸¹ The stereotype is flawed, he explains, insofar as “the romantic vision of authorship plays down the importance of external sources by emphasizing the

the public domain in visual form). *See also, e.g.,* Ashley Packard, *Copyright Term Extensions, the Public Domain and Intertextuality Intertwined*, 10 J. INTELL. PROP. L. 1, 15–16 (2002).

⁷⁶ See Samuelson, *supra* note 69, at 826–27.

⁷⁷ This risk is heightened with respect to those uses of the term “public domain” that refer principally to the public availability of a work rather than to its legal status, *e.g.,* Samuelson, *supra* note 69, at 797–99, for users of copyrighted works that are widely available online may be quite surprised to find themselves in legal trouble. *See id.* at 831. It is partly for this reason that participants in the open-source software movement (and similar open-content licensing movements such as Creative Commons) generally take pains to emphasize that their works are actually copyrighted and not free for public use except upon the terms stated in the applicable licenses. *See, e.g.,* Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 367 n.40, 370–71 (2010).

⁷⁸ See Litman, *supra* note 74.

⁷⁹ See *id.* at 966 (“the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea”), 1007–12.

⁸⁰ See Armstrong, *supra* note 77, at 367 & n.36.

⁸¹ JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 56 (1996).

unique genius of the author and the originality of the work.”⁸² A legal regime premised upon the “romantic author” notion will tend to portray authors as deserving, and even noble, beneficiaries of copyright’s largesse.⁸³ Benefits given to authors, however, come at a significant, and underappreciated, social cost: cleaving too closely to the “romantic vision,” Boyle writes, threatens to “impede innovation and scientific progress, diminish the availability of our cultural heritage, inhibit artistic innovation, and restrict public debate and free speech.”⁸⁴ One need not diminish the importance of individual authorial endeavor to recognize that “[t]he tendency of the current system to undervalue the importance of the public domain can deprive the truly creative among us of the raw material necessary to create their next transformative artifacts.”⁸⁵

The view that authorship depends on a vibrant, vital public domain also was ably summarized by Judge Kozinski in *White v. Samsung Electronics America Inc.*:

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.⁸⁶

Judge Posner agreed, writing recently in *Klinger v. Conan Doyle Estate, Ltd.*, that:

[E]xtending copyright protection is a two-edged sword from the standpoint of inducing creativity, as it would reduce the incentive of subsequent authors to create derivative works (such as new versions of popular fictional characters like Holmes and Watson) by shrinking the public domain. For the longer the copyright term is, the less public-domain material there will be and so the greater will be the cost of authorship, because authors will have to obtain licenses from copyright holders for more material[.]⁸⁷

This view of the importance of the public domain carries particular force because of its clear linkage to copyright law’s fundamental objective: to promote the creation and

⁸² *Id.* at 114.

⁸³ *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

⁸⁴ BOYLE, *supra* note 81, at 125.

⁸⁵ *Id.* at 165.

⁸⁶ 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc).

⁸⁷ 755 F.3d 496, 501 (7th Cir. 2014); *see also id.* (“The smaller the public domain, the more work is involved in the creation of a new work. The defendant’s proposed rule would also encourage authors to continue to write stories involving old characters in an effort to prolong copyright protection, rather than encouraging them to create stories with entirely new characters. The effect would be to discourage creativity.”).

dissemination of expressive works. If Professors Litman and Boyle, and Judges Kozinski and Posner, are correct that fostering new creative expression depends on the abundance and accessibility of works in the public domain, then protecting the public domain against proprietary encroachment is an essential step in advancing copyright law's ultimate ends.

2. As a guarantor of free expression

Closely aligned with the preceding view is a related argument. If the public domain fosters the creation of new expressive works, then protecting the public domain serves not only the traditional interest of copyright law, but also promotes constitutional free speech. Professor Yochai Benkler writes that treating expressive material as a form of property carries an inherent risk of chilling expression, because we are habituated by long experience to thinking of property as something whose distribution can be controlled (or even prevented entirely) by its owner, a concept difficult to square with First Amendment principles.⁸⁸ Recognizing a form of property right in expressive material, as copyright does, is not the same as recognizing property rights in real estate or corporate stock. As Professor Neil Weinstock Netanel notes: "Unlike most property rights, copyright law is fundamentally an instrument of media and communications policy and an integral part of our system of free expression."⁸⁹

The Supreme Court has expressed inconsistent views on the relationship between copyright and First Amendment interests. The fault partly lies in a temporal confusion about just whose speech is affected by the operation of the law. If one begins by assuming that more speech is generally preferable to less speech,⁹⁰ then that policy that promotes speech the most while interfering with speech the least is best. Yet, copyright law both rewards and punishes speech.⁹¹ Consider two speakers, "A" and "B." A's speech occurs first in time and is thereafter quoted and criticized by B. If the promise of remuneration led A to speak when she would otherwise have remained silent, then copyright has served First Amendment interests; it is surely something like this that the Court had in mind when it wrote that "the Framers intended copyright itself to be the

⁸⁸ See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. REV. 354, 356 (1999) ("Expecting information to be owned, and to be controlled by its owner, blinds us to the cost that this property system imposes on our freedom to speak.").

⁸⁹ NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 38 (2008). For a sustained argument for substantially curtailing intellectual property rights in expressive material because of the conflict thereby created with expressive interests, see DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2009).

⁹⁰ See *Whitney v. California*, 274 U.S. 357, 377 (1927) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.") (Brandeis, J., concurring); see also, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) ("The remedy for speech that is false is speech that is true.").

⁹¹ See NETANEL, *supra* note 89, at 37 ("Copyright both fosters original expression and impedes uses of existing expression.").

engine of free expression.”⁹² A’s copyright, however, can prevent B’s speech from occurring, curtailing rather than fostering expression.⁹³ Concern with the restrictive effect of an earlier speaker’s copyright on a later speaker’s expression led the Court to declare that copyright’s limitations, including the idea/expression dichotomy and the fair use doctrine, constituted the law’s “built-in First Amendment accommodations.”⁹⁴ The Court’s most recent foray into the relationship between copyright and free speech principles, *Golan v. Holder*, will be taken up below; the point for present purposes is simply to emphasize that the contours of the public domain are consequential for reasons of constitutional magnitude, not merely because the public domain provides the raw materials for the creation of new copyrightable expressive works.

3. As a repository of scientific truth

A third benefit flowing from the existence of a robust public domain has to do with its status as a repository of human knowledge and scientific truth, irrespective of whether those materials are used to create additional expressive works. The constitutional referent here lies not in the First Amendment, but the Progress (or Intellectual Property) Clause, which empowers Congress to grant “exclusive rights” to “authors” in order “to promote the progress of science.”⁹⁵ Scientific inquiry depends upon processes, such as broad dissemination of research materials for purposes such as peer review and testing the reproducibility of results, that stand in tension with strong claims of proprietary ownership.⁹⁶ Fulfilling the constitutional purpose of “promoting progress,” therefore, requires us to preserve a zone of basic information that remains available for free and legally unencumbered discussion, sharing, and analysis.

So central to copyright’s purpose is the conception of the public domain as a repository of scientific and factual knowledge that the principle receives overlapping protection from many directions and multiple doctrines at once. Indeed, the Copyright Act itself, which has relatively

⁹² Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985).

⁹³ See John Tehranian, *The New ©ensorship*, 101 Iowa L. Rev. 245 (2015) (cataloging multiple uses of copyright to suppress expression); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (expressing concern that courts in copyright cases, applying the mechanism of injunctive relief, may effectively impose prior restraints on speech without conducting any First Amendment analysis).

⁹⁴ Eldred v. Ashcroft, 537 U.S. 186, 219 (2003). See generally *infra* notes 156–160 and accompanying text.

⁹⁵ U.S. Const. Art. I, § 8, cl. 8. The Constitution’s phraseology should be understood in contemporary usage as meaning something akin to the “advancement of knowledge” or the “promotion of learning.” Cf., e.g., Pierre N. Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1052 (2002).

⁹⁶ See, e.g., Christopher M. Kelty, *Free Software/Free Science*, FIRST MONDAY (Dec. 2001) (citing Robert K. Merton’s sociological norms of scientific endeavor that treat “ideas, formulae, data, or results” as essentially a form of common property), available at <http://perma.cc/AAJ7-KLU5>; Mario Biagioli, *Rights or Rewards?: Changing Contexts and Definitions of Scientific Authorship*, 27 J. COLLEGE & UNIVERSITY L. 83, 84 (2000).

little to say about the importance of fostering creative reuses of other authors' expression,⁹⁷ delimits the fact-oriented public domain in express terms, declaring "any idea, procedure, process, system, method of operation, concept, principle, or discovery" to be unprotected by the copyright of the work in which it appears.⁹⁸

Although the roots of the fact-oriented public domain extend as far back as the Supreme Court's 1879 decision in *Baker v. Selden*, which held that the copyright in plaintiff's accounting book was not infringed by defendant's description of a similar system of accounting in his own book,⁹⁹ the Court considered the policy behind excluding factual matter from copyright in considerably greater depth in its more recent decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹⁰⁰ There, the Court explained:

[F]acts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. . . . Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. The same is true of all facts—scientific, historical, biographical, and news of the day. "[T]hey may not be copyrighted and are part of the public domain available to every person."¹⁰¹

Consistently with this view, the Court has also invoked the need for free-ranging scientific inquiry as a basis for limiting the scope of patent protection.¹⁰²

⁹⁷ The statutory recognition of the fair use doctrine, 17 U.S.C. § 107 (2012), probably represents the closest thing to a legislative recognition of the justifications offered for the public domain in the first two subparts of the present discussion—and even there, the provision takes the form of an affirmative defense to liability rather than a legislative declaration that some material is outside the scope of copyright protection in the first instance.

⁹⁸ 17 U.S.C. § 102(b) (2012).

⁹⁹ 101 U.S. 99 (1879).

¹⁰⁰ 499 U.S. 340 (1991).

¹⁰¹ *Id.* at 347–48 (citations omitted).

¹⁰² See, e.g., *Bonito Boats Inc. v. Thunder Craft Boats Inc.*, 489 U.S. 141, 156 (1989) ("concepts within the public grasp, or those so obvious that they readily could be, are the tools of creation available to all" and "provide the baseline of free competition upon which the patent system's incentive to creative effort depends"). The Court's recent decisions denying patent eligibility to what it perceived as basic research tools or the raw materials of scientific inquiry represent further expressions of this principle. See *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013); *Mayo Collaborative Servs. v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012); cf. *Laboratory Corp. of Am. Holdings v. Metabolite Laboratories, Inc.*, 548 U.S. 124, 127 (2006) (Breyer, J., dissenting from dismissal of certiorari) (recognizing that patents "can discourage research by impeding the free exchange of information, for example by forcing researchers to avoid the use of potentially patented ideas, by

Copyright law's merger doctrine creates a further buffer zone around factual and scientific knowledge to prevent the free reuse of such knowledge from being encumbered by proprietary claims. The merger rule, as commonly understood, denies copyright protection not only to raw factual information itself, but also to expression necessary to communicate that information.¹⁰³ In sum, an appreciation of the public domain's value as a repository of scientific and factual knowledge, and recognition that the advancement of learning depends to some degree on such knowledge remaining lawfully free to reuse and distribute, has produced a wide variety of particular legal rules that serve, individually and in the aggregate, to preserve the public domain against encroaching proprietization.

4. As a disciplining mechanism for licensing markets

A further benefit to the wide availability of expressive content in the public domain lies in its effects upon licensing transactions for non-public-domain works. Copyright owners asked to license their work for expressive reuse may be deterred from asking too high a price if a tolerably close substitute for their work is available in the public domain. The availability of similar (and freely reusable) expressive content in the public domain gives later creators an alternative to negotiating with earlier creators for a license, and the existence of this alternative may deter earlier creators from demanding excessive compensation for reuse of their works.

An example may illuminate the basic point. An author who wishes to borrow from *West Side Story* to craft her own tale of star-crossed lovers must expect to pay for the rights to do so, because *West Side Story* is under copyright. If the owners of *West Side Story*'s copyright demand a fee higher than she is willing to pay, they will reach no agreement.¹⁰⁴ But *West Side Story*'s

leading them to conduct costly and time-consuming searches of existing or pending patents, by requiring complex licensing arrangements, and by raising the costs of using the patented information, sometimes prohibitively so.”).

¹⁰³ See, e.g., *Kregos v. AP*, 937 F.2d 700, 705 (2d Cir. 1991) (“even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself”); *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988) (“Some ideas admit of only a limited number of expressions. When there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression.”).

¹⁰⁴ This risk is substantial. See, e.g., William J. Baumol, *Applied welfare economics*, in A HANDBOOK OF CULTURAL ECONOMICS 20, 28 (Ruth Towse, ed., 2003) (“Prohibitively high licensing fees are equivalent to outright refusal to license to anyone”); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 95–99 (2004) (recounting one such incident). Transaction costs, too, may prevent bargaining even where the parties may be able to agree on a reasonable license value. See Richard A. Posner, *Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property*, 4 J. MARSHALL REV. INTELL. PROP. L. 325, 326 (2005). The well-known “orphan works” problem illustrates the problem of transaction costs and presents another scenario in which the cost of identifying the proper licensor may exceed the value to be derived from entering into a license. See, e.g., Cecil C. Kuhne, III, *The Steadily Shrinking Public Domain: Inefficiencies of Existing Copyright Law in the Modern Technology Age*, 50 LOY. L. REV. 549, 558–59 (2004); M. William Krasilovsky, *Observations on the Public Domain*, 14 BULL. COPYRIGHT SOC'Y U.S.A. 205,

owners may be deterred from demanding an exorbitantly high fee by the knowledge that, if the parties cannot agree on licensing terms, the would-be author may draw similar content from *Romeo and Juliet*, which is in the public domain (and from which *West Side Story* itself drew).¹⁰⁵ The point is perhaps a small one and should not be overstated, but in essence, the public domain provides an alternative pool of expressive content the availability of which discourages copyright holders from demanding excessive licensing fees and thereby facilitates at least some transactions that would not otherwise occur.¹⁰⁶ This suggests that the public domain should be valued not only for its own sake, but for the constraining force it exerts on copyright owners in licensing negotiations and for its resulting encouragement of mutually advantageous bargaining over reuse of expressive works.

B. Policy Implications of Copyright Scholarship on the Public Domain

The preceding discussion provides an assortment of rationales collectively suggesting that the public domain needs a relatively robust level of legal protection against encroachment by proprietary claims. A well-developed corpus of legal scholarship on the public domain, however, suggests that current United States copyright law undervalues and underprotects the public domain, thereby disserving interests of both statutory and constitutional magnitude. Public domain scholarship calls attention to the “costs” side of copyright’s ledger of costs and benefits. In so doing, this scholarship highlights the difficulties that follow from treating copyright as a matter of right (rather than of legislative grace) for authors and from maintaining an over-romanticized image of authorial endeavor. If the romantic, moralistic view of authorship suggests that copyright rights cannot be made too strong or too lengthy in duration, public domain scholarship supplies an important corrective: just because some level of copyright protection is good, it does not follow that a higher level of protection is necessarily better, for every alteration in the balance comes at a cost to someone. Giving more rewards to yesterday’s authors penalizes tomorrow’s, whose costs to create will rise and whose incentives to create may correspondingly diminish, resulting in a contraction (rather than an expansion) of expressive output. Professor Yochai Benkler summarized this basic insight:

Today’s users of information are not only today’s readers and consumers.
They are also today’s producers and tomorrow’s innovators. Their net

212 (1967) (“Imagine the block on cultural development if the heirs of Shakespeare or Beethoven would have to be located to grant licenses.”).

¹⁰⁵ Cf. LANDES & POSNER, *supra* note 64, at 67–68 (cataloging illustrations of expressive borrowing).

¹⁰⁶ By focusing in this portion of the essay on the public domain’s impact on copyright licensing, I make no normative claims about the primacy of licensing transactions as a preferred means of fostering expressive activity. Cf., e.g., Molly Shaeffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1565–66 (2005) (questioning overly rosy descriptions of licensing markets in copyright case law and scholarship). In particular, the Supreme Court’s view that private licensing transactions represent a constitutionally adequate replacement for the free availability of public domain information seems entirely misguided. See *infra* note 286 and accompanying text.

benefit from a strengthened patent or copyright regime, given not only increased potential revenues but also the increased costs, may be negative. If we pass a law that regulates information production too strictly, allowing its beneficiaries to impose prices that are too high on today's innovators, then we will have not only too little consumption of information today, but also too little production of new information for tomorrow.¹⁰⁷

Maintaining (or, in most scholars' view, establishing) the optimal balance between the interests of copyright holders in their works and the broader public's interest in the public domain would entail substantial alterations to current law. Scholars have proposed a wide assortment of alterations to current law to account better for the importance of the public domain. One family of proposals seeks to protect the public domain against proprietary encroachment: if the public domain is itself a form of property held in common, then perhaps its borders should be clearly staked and marked,¹⁰⁸ and parties who wrongly assert individual ownership of any portion of the commons should be penalized.¹⁰⁹ It should be easy for authors who wish to place their works into the public domain to do so,¹¹⁰ and the public should be entitled permanently to rely on the public-domain status of a work.¹¹¹ Other proposals, seeking to foster creative repurposing (not mere copying) of expressive material, would withdraw from copyright holders the power to control noncommercial exploitation¹¹² or the exclusive right to create derivative works.¹¹³ A more significant transformation would result under proposals to restore some formal

¹⁰⁷ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 38 (2006).

¹⁰⁸ See, e.g., David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139 (2009); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 176–77 (1981) (suggesting that recognition of any claim of proprietary ownership should be accompanied by express terms setting the outer limits of the grant).

¹⁰⁹ See JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* ch. 8 (2011) (proposing new scheme of civil liability to deter false claims of proprietary ownership of public-domain materials).

¹¹⁰ See Pamela Samuelson *et al.*, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1227–28 (2010).

¹¹¹ Compare *id.* with *infra* notes 284–286 and accompanying text. See also Armstrong, *supra* note 77, at 409–10 (arguing that authors' express dedications to the public domain may nevertheless be revocable under current law); Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1149 (2003) (questioning whether existing law provides any enforceable mechanism for a permanent dedication of an author's work to the public domain).

¹¹² See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 41–45 (2010).

¹¹³ See Derek Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345 (2008).

requirements for copyright protection, such as registration and renewal¹¹⁴—requirements that may contravene the United States’ treaty commitments,¹¹⁵ at least as they now exist.¹¹⁶ Finally, and perhaps most dramatically, the open-source software phenomenon (and the movement for open content more generally, illustrated by the work of the Creative Commons organization) represent efforts to leverage contract and copyright principles to erect what is in essence a second “quasi-public” domain consisting of works that may freely be reused and repurposed provided a set of (comparatively lenient) license conditions are met.¹¹⁷

Copyright law today thus stands roughly where antitrust law stood in the late 1970s. Antitrust scholars of that era saw a body of law that they believed had grown ossified and disserved consumer interests. Today’s copyright scholars see a body of law that increases the costs of creating expressive works and fits poorly with the realities of the modern information economy. The policy changes that antitrust underwent during the last three decades, however, so far have no parallel in copyright law.

¹¹⁴ See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003). See generally Symposium, *Reform(aliz)ing Copyright for the Internet Age*, 28 BERKELEY TECH. L.J. 1415 (2013).

¹¹⁵ See Convention for the Protection of Literary and Artistic Works, Art. 5(2), opened for signature Sept. 9, 1886, 6 U.S.T. 2731 (“[t]he enjoyment and exercise of [copyright] rights shall not be subject to any formality”) [hereafter “Berne Convention”]. A creative attempt to reconcile the Berne Convention’s prohibition on formalities with a renewed registration requirement is articulated in Kenneth D. Crews, *Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine*, 55 SYRACUSE L. REV. 189 (2005), which would make copyright protection beyond the life-plus-50 term mandated by Art. 7(1) of the Berne Convention contingent upon registration of copyright in the work.

¹¹⁶ The size of its economy confers on the United States a measure of bargaining power in international negotiations over intellectual property matters, at least *vis-à-vis* smaller economic actors. For example, the United States has been successful in insisting that smaller trading partners strengthen intellectual property protections as a condition for entering into free trade agreements with the U.S. See, e.g., Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447 (2011); Carsten Fink & Patrick Reichenmiller, *Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements*, in TRADE, DOHA, AND DEVELOPMENT: A WINDOW INTO THE ISSUES 289 (Richard Newfarmer, ed., 2006); Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215 (Lorand Bartels & Federico Ortino, eds., 2006). These examples provide at least some reason to believe that, were the United States to adopt new formal requirements for securing or maintaining copyright protection, it would be possible to alter the United States’ international commitments to make such formal requirements lawful. Indeed, the more likely course may be to secure international agreement first, then adopt implementing legislation in the United States as occurred in the case of the DMCA. See JESSICA LITMAN, DIGITAL COPYRIGHT 122–45 (2001). On the other hand, amending international treaties to permit formal conditions on copyright protection would require the assent of larger world economies as well, who may have less reason to acquiesce to pressure from the United States; indeed, it was international dislike of then-existing U.S. copyright formalities that partly led to the enactment of the URAA statute discussed below. See *infra* notes 222–238 and accompanying text.

¹¹⁷ See, e.g., Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004).

IV. Solicitude for the Public Domain in Copyright Cases and Policy

A. Limiting the Public Domain

A colleague once asked Professor Jonathan Zittrain, “why [do] all the cyberprofs hate copyright?”¹¹⁸ Although “hate” is probably the wrong word, he replied, it was certainly true that “[a]lmost all of us who study and write about the law of cyberspace agree that copyright law is a big mess.”¹¹⁹ Indeed, observations about the overwhelmingly critical state of copyright scholarship have themselves become a sort of meta-component of academic discourse.¹²⁰ Although the law has defenders who have occasionally expressed dismay at the critical barrage,¹²¹ and some parts of the law undoubtedly enjoy greater popularity than others,¹²² the overall tone of scholarly commentary on copyright law has a distinctly critical flavor.

Outside the academic community, however, matters generally are different. Some of this surely reflects simple economics; the business world promises great fortunes to be made in creating and defending intellectual property,¹²³ whereas the broader social stake in the public domain may be too attenuated to attract comparable legal resources.¹²⁴ Nevertheless, scholarship

¹¹⁸ Jonathan Zittrain, *The Copyright Cage*, LEGAL AFFAIRS (July/Aug. 2003), <http://perma.cc/9DZN-XDP3>.

¹¹⁹ *Id.*

¹²⁰ See, e.g., Peter S. Menell, *This American Copyright Life: Reflections on Re-equilibrating Copyright for the Internet Age*, available at <http://ssrn.com/abstract=2347674> (Oct. 30, 2013), manuscript at 4 (“at no time in ... copyright law’s 300 year history, has the copyright system been more severely criticized as being out of touch and out of date”); Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 740 (2013) (“Copyright law has taken quite a beating in the legal literature in the past decade or so.”); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 537 & n.1.

¹²¹ See, e.g., Merges, *supra* note 117, at 183 n.1; Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC’Y U.S.A. 1, 1 (1997) (“For one drawn to copyright both for its intellectual fascination and its inspiring goals of fostering creativity and protecting authorship, I am distressed to learn that I am among the defenders of a fallen faith”).

¹²² I am unaware, for example, of any substantial disagreement over copyright’s core principle that authors should be empowered to prevent unauthorized, nontransformative commercial duplication of their works. On the other hand, scholarly commentary on the Digital Millennium Copyright Act certainly resembles Judge Bork’s “cascade of vituperation.” See *supra* note 1.

¹²³ See, e.g., Kevin G. Rivette *et al.*, *Discovering New Value in Intellectual Property*, HARV. BUS. REV., Jan./Feb. 2000, at 54.

¹²⁴ As others have recognized, a basic collective action problem exists whenever economic rights in a particular piece of property come into conflict with the interests of the broader public, for the public’s interest is unlikely to be directly represented in any individual case—or may be represented, at best, only by proxy, to the extent that the interests of a party opposing the assertion of exclusive rights may resemble the interests of the public. See, e.g., BOYLE, *supra* note 64, at 241 (noting that one problem with preserving the public domain is that rights holders’ interests are concentrated and tangible, while the public’s interest is more diffuse). For examples of organizations and individuals working to overcome the collective action dilemma, see *id.* at 243–44; Peter Goodrich, Sonia K. Katyal, & Rebecca Tushnet, *Panel I: Critical Legal Studies in Intellectual Property and Information Law*

tending to support significant limits on copyright is broadly available for use by advocates in real-world cases and surely is known to the courts. Unlike in antitrust law, however, where hostile scholarly commentary produced substantial changes in legal doctrine, in intellectual property, “this outpouring of scholarship has been notably unsuccessful in winning judicial converts.”¹²⁵ The point may be illustrated by considering a few cases in which the interests of copyright holders have come into conflict with the principle that a strong and vibrant public domain deserves protection against proprietary encroachment. This section considers three such cases: the Supreme Court’s decisions in *Eldred v. Ashcroft*¹²⁶ and *Golan v. Holder*,¹²⁷ and the Ninth Circuit’s intervening decision in *Kahle v. Gonzales*.¹²⁸ The cases will be discussed chronologically.

1. *Eldred v. Ashcroft*

In the Sonny Bono Copyright Term Extension Act (“CTEA”),¹²⁹ Congress extended by 20 years the duration of all copyrights then in force. For works published and copyrighted before January 1, 1978, the statute lengthened the second term of protection that all works were potentially eligible to receive from 47 to 67 years (while leaving the first term of 28 years unaltered, thus increasing the total duration of copyright for such works from 75 to 95 years).¹³⁰ For works created on or after January 1, 1978, the statute extended the duration of copyright from 50 to 70 years after the death of the author (or last surviving co-author) of the work.¹³¹

By extending the duration of copyright protection, the CTEA blocked the entry of existing works into the public domain. The works most immediately affected were those

Scholarship, 31 CARDOZO ARTS & ENT. L.J. 601, 607–10 (2013) (comments of Rebecca Tushnet); Victoria Smith Ekstrand, Andrew Famiglietti, & Suzanne V.L. Berg, *Birthing “CLA”: Critical Legal Activism, the IP Wars and Forking the Law*, 31 CARDOZO ARTS & ENT. L.J. 663, 675–81 (2013).

¹²⁵ Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1171 (2007). The quotation refers specifically to scholarship on copyright and the First Amendment, but the basic point applies quite a bit more generally than that context may suggest. For thoughts along similar lines, see, e.g., Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 464 (2010) (“Even though there have been ever-increasing calls by intellectual property (IP) scholars for greater First Amendment scrutiny in copyright cases, there has been a virtually unrelenting rejection of First Amendment review in copyright cases.”); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1537 (1993) (“Lawyers, law professors, and even judges are on record pleading for the law to subject intellectual property to the same free speech principles that limit other assertions of governmental power. . . . But the courts have too often turned a deaf ear to these arguments.”).

¹²⁶ 537 U.S. 186 (2003).

¹²⁷ 132 S. Ct. 873 (2012).

¹²⁸ 487 F.3d 697 (9th Cir. 2007).

¹²⁹ Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹³⁰ *Id.* § 102(d), 112 Stat. at 2827–28 (amending 17 U.S.C. § 304).

¹³¹ *Id.* § 102(b), 112 Stat. at 2827 (amending 17 U.S.C. § 302).

published beginning in the year 1923. Before the CTEA, works copyrighted in 1923 would have enjoyed an initial term of copyright protection of 28 years (until the end of 1951), followed by a renewal term of 47 years (until the end of 1998) and would thereafter have entered the public domain. By lengthening the second copyright term to 67 years, however, the CTEA kept those works out of the public domain until the end of 2018 (assuming Congress enacts no further legislative extensions). The same is necessarily true of all copyrighted works published more recently than 1923: works published in 1924 (and validly renewed) will now enter the public domain at the end of 2019 rather than 1999; those published in 1925 in 2020 rather than 2000; and so forth. The effect of the CTEA was to put a 20-year moratorium on the entry of copyrighted works into the public domain, although the statute did not restore protection to any works whose copyrights had previously expired.¹³²

Copyright and constitutional law scholars roundly criticized the statute.¹³³ Although no one doubted that Congress generally possessed the power to fix the duration of copyright rights,¹³⁴ its exercise of that power retroactively to extend the duration of copyright in pre-existing works struck many observers as problematic. The basic argument concerned incentives to create: An author considering today whether to create a work might be moved to do so by Congress's promise that the author's copyright protection would endure for a longer period, but such a calculus could not possibly matter to authors who had already created their works at the

¹³² Thus, works published under copyright in 1922 or earlier remained in the public domain in the United States notwithstanding the CTEA. (Using the 28-year first term followed by 47-year second term framework, copyright in a 1922 work would have expired December 31, 1997.)

¹³³ See, e.g., Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 70–74 (2001); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19 (2001); Robert P. Merges & Glenn H. Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45 (2000); Kenneth D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress*, 6 IND. J. GLOBAL LEGAL STUD. 117, 132–35 (1998) (discerning trend in recent copyright legislation to provide greater private rights without corresponding public benefit); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 923–33 (1997) (discussing predecessor legislative proposals that ultimately became the CTEA). See also Symposium, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution*, 36 LOY. L.A. L. REV. 1 (2002) (most, but not all, contributions by academic contributors to the Symposium conclude that the CTEA's constitutionality is doubtful, while contributions by private attorneys representing large media organizations praise the statute); Symposium, *An Evaluation of the Copyright Extension Act of 1995*, 14 CARDOZO ARTS & ENT. L.J. 625 (1996) (mini-symposium of three articles, each of which finds problematic the then-pending legislative precursors to the CTEA). See generally Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. COPYRIGHT SOC'Y U.S.A. 547, 548–49 n.6 (2003) (cataloging scholars' views).

¹³⁴ The language of U.S. Const. Art. I, § 8, cl. 8, which empowers Congress “to promote the progress of science . . . by securing for limited times to authors . . . the exclusive right to their . . . writings” (emphasis added), necessarily implies that Congress may fix some “limited times” for which the rights created in the exercise of this power endure.

time the CTEA was passed, particularly if those authors were already deceased.¹³⁵ Because enlarging past copyrights could do nothing to spur the creation of new works, the retroactive extension of existing copyrights struck many observers as a simple giveaway to publishers and media companies at the expense of the public.¹³⁶ Others feared that keeping works that had been about to become freely available for public use under copyright protection for two more decades would impair free expression.¹³⁷

Publisher Eric Eldred filed a lawsuit challenging the constitutionality of the CTEA. He argued that the statute contravened both the protections of the First Amendment (by forbidding expressive reuse of materials that would otherwise have been part of the public domain) and the “limited times” requirement of the Constitution’s intellectual property clause (by extending the duration of past copyrights). A district court upheld the constitutionality of the statute,¹³⁸ and a divided panel of the D.C. Circuit affirmed.¹³⁹ With respect to the “limited times” requirement, the panel majority suggested that this language forbade only copyrights that were literally unending,¹⁴⁰ and rejected Eldred’s argument that the Constitutional directive to “promote progress” circumscribed legislative authority.¹⁴¹ The panel further concluded that the

¹³⁵ See, e.g., Patry, *supra* note 133, at 915 (“obviously no further works can be induced”).

¹³⁶ See Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTEL. PROP. REV. 193, 201–03 (2004); Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 128 (2002) (“the CTEA looks like a massive giveaway of public domain resources for private use”) (footnote omitted); Netanel, *supra* note 133, at 70 (finding that CTEA gave publishers a “double windfall of an additional twenty years of copyright protection and, in many cases, of having acquired valuable copyrights for prices that did not reflect the subsequently extended term”); Patry, *supra* note 133, at 932–33 (identifying beneficiaries of term extension as distributors and estates of deceased authors). Cf. *Golan v. Holder*, 132 S. Ct. 873, 907 (2012) (Breyer, J., dissenting) (“when a copyright law is primarily backward looking the risk is greater that Congress is trying to help known beneficiaries at the expense of badly organized unknown users who find it difficult to argue and present their case to Congress”).

¹³⁷ See Erwin Chemerinsky, *Balancing Copyright Protection and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 8, 95–97 (2002); Netanel, *supra* note 133, at 73.

¹³⁸ *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999).

¹³⁹ *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

¹⁴⁰ *Id.* at 377 (“If the Congress were to make copyright protection permanent, then it would surely exceed the power conferred upon it by the Copyright Clause.”).

¹⁴¹ See *id.* at 377–78. This portion of the majority’s argument drew a strong dissenting opinion from Judge Sentelle, who maintained that the language of the Constitution

empowers the Congress to do one thing, and one thing only. That one thing is “to promote the progress of science and useful arts.” . . . The clause is not an open grant of power to secure exclusive rights. . . .

. . . Extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.

constitutional requirement of expressive originality enunciated by the Supreme Court in *Feist Publications Inc. v. Rural Telephone Service Co.*¹⁴² applied only to the threshold question of copyrightability *vel non*, and did not impose a further requirement that the author produce additional original expression to justify enlarging the term of an existing copyright.¹⁴³ As to the free speech issue, the panel unanimously agreed that “copyrights are categorically immune from challenges under the First Amendment.”¹⁴⁴

By a 7–2 vote, the Supreme Court found the CTEA constitutional and affirmed the Court of Appeals’ decision.¹⁴⁵ The majority first noted that Congress had on many prior occasions extended the duration of copyrights then in force, although the question whether such extensions complied with constitutional standards had not previously been litigated.¹⁴⁶ Lacking relevant precedent in the domain of copyright law, the majority turned instead to patent law, and declared it relevant that “early Congresses extended the duration of numerous individual patents”¹⁴⁷ and that “[t]he courts saw no ‘limited times’ impediment to such extensions[.]”¹⁴⁸ Because Congress lawfully could enlarge the duration of an existing patent, the majority reasoned, it must hold

Id. at 381–82 (Sentelle, J., dissenting in part). Copyright scholarship has tended to validate the view that the words “to promote the progress of science” were intended as a substantive constraint on legislative power. *See* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771 (2006); Patterson, *supra* note 70, at 348, 355–56; Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001); *but cf.* Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993) (suggesting that promotion of “Progress” as an end in itself suffers from textual indeterminacy and is historically and culturally contingent).

¹⁴² 499 U.S. 340 (1991).

¹⁴³ *Eldred v. Reno*, 239 F.3d at 376–77.

¹⁴⁴ *Id.* at 375. Commentators seemed particularly dismayed by the court’s pronouncement on this point. *See, e.g.,* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 179 (2003) (“Categorical exemption is untenable.”); L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 227–28 (2001). For a critical examination of the courts’ lengthy history of denying that copyright law and free expression are in any way antagonistic, see Michael D. Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA J.L. & TECH. 233 (2003).

¹⁴⁵ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹⁴⁶ *Id.* at 194–96, 200–02.

¹⁴⁷ *Id.* at 201 (citing three such statutes enacted between 1808 and 1815).

¹⁴⁸ *Id.* at 202. The majority placed particular emphasis on *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843), which upheld the retroactive application of the provisions of a new statute to a patent issued before the statute was passed. *Eldred*, 537 U.S. at 202–04; *see also McClurg*, 42 U.S. at 206 (“the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents”).

comparable power to enlarge the duration of existing copyrights.¹⁴⁹ Whether Congress had exercised that power wisely was a subject the majority declared to be essentially outside its purview, noting that the statute “reflects judgments of a kind Congress typically makes”¹⁵⁰ and that the Court should “defer substantially to Congress”¹⁵¹ with respect to those judgments. Finally, the majority rejected a number of Eldred’s arguments for a narrower reading of the Constitution’s intellectual property clause: it declined to construe Congress’s history of repeated enlargements of the copyright term “as a congressional attempt to evade or override the ‘limited Times’ constraint”;¹⁵² agreed with the Court of Appeals that the constitutional requirement of original expression need not be satisfied every time Congress altered the duration of an existing copyright¹⁵³ and that the constitutional directive to “promote Progress” did not operate as a constraint upon legislative authority;¹⁵⁴ and reasoned that the *quid pro quo* inherent in the copyright system—an exchange of statutory exclusive rights in return for authors’ creation and dissemination of their works—did not implicitly preclude Congress from altering the scope of that bargain after the works were created in ways that benefited the authors concerned.¹⁵⁵

The Court next addressed whether the CTEA impermissibly restricted speech protected under the First Amendment. Focusing its attention not specifically on the CTEA but instead on several broader copyright doctrines, the majority declared that “copyright law contains built-in First Amendment accommodations” that sufficed to protect expressive reuse of copyrighted materials.¹⁵⁶ These “accommodations” included, first, the idea/expression dichotomy, which excludes the ideas conveyed in any work from copyright protection and leaves them freely available for reuse by others.¹⁵⁷ The Court found a second “accommodation” in copyright’s fair use doctrine, which allowed reuse of other authors’ copyrighted expression (not merely their ideas) in some circumstances.¹⁵⁸ The Court also noted that the CTEA itself broadened some provisions of the statute that permitted certain unlicensed uses of copyrighted works.¹⁵⁹ Although

¹⁴⁹ See *Eldred*, 537 U.S. at 204.

¹⁵⁰ *Id.* at 205.

¹⁵¹ *Id.* at 204.

¹⁵² *Id.* at 209 (footnote omitted).

¹⁵³ Compare *id.* at 211 with *supra* note 143 and accompanying text.

¹⁵⁴ Compare *Eldred*, 537 U.S. at 211–14, with *supra* note 141 and accompanying text.

¹⁵⁵ See *Eldred*, 537 U.S. at 214–15.

¹⁵⁶ *Id.* at 219 (citation omitted).

¹⁵⁷ *Id.*; cf. *supra* notes 62 (noting unprotectability of ideas and other non-expressive material found within copyrighted works), 97–103 (explaining how preserving a domain free from proprietary claims advances the constitutional objectives of copyright law) and accompanying text.

¹⁵⁸ *Eldred*, 537 U.S. at 219–20.

¹⁵⁹ See *id.* at 220 (summarizing CTEA’s amendments to 17 U.S.C. §§ 108(h) & 110(5)(B)). The latter statutory change was subsequently determined to contravene the United States’ international treaty obligations, but remains

the Court rejected Eldred's argument that the CTEA impaired free speech interests by forbidding expressive reuse of materials that would have entered the public domain but for the statute, it refused to exempt all copyright legislation from First Amendment scrutiny as the Court of Appeals had done, explaining that:

The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D. C. Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment." But *when, as in this case, Congress has not altered the traditional contours of copyright protection*, further First Amendment scrutiny is unnecessary.¹⁶⁰

Justices Stevens and Breyer dissented. Justice Stevens challenged the majority's reliance on prior legislative extensions of existing patents,¹⁶¹ noting that the examples on which the majority had relied were either inapposite or rested upon principles that subsequent cases had declared to be unconstitutional.¹⁶² He further rejected the proposition that expanded copyright protection could be justified as an incentive to encourage the restoration and preservation of previously created works.¹⁶³ Justice Stevens found that the CTEA contravened the public's reliance interest in free reuse of a copyrighted work following the expiration of whatever period of protection initially induced the author to create that work, reasoning that:

The reason for increasing the inducement to create something new simply does not apply to an already-created work. To the contrary, the equity argument actually provides strong support for petitioners. Members of the public were entitled to rely on a promised access to copyrighted or

on the books at the time of this writing. See Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000).

¹⁶⁰ *Eldred*, 537 U.S. at 221 (citation omitted, emphasis added). Cf. *supra* note 144 and accompanying text.

¹⁶¹ See *supra* notes 147–149 and accompanying text.

¹⁶² Justice Stevens was particularly dismissive of the majority's reliance on a series of private laws enacted from the late 18th to the mid-19th centuries which had retroactively extended patent protection to particular inventions that had already fallen into the public domain, a practice he deemed incompatible with the Court's declaration in *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966), that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." See *Eldred*, 537 U.S. at 234–35, 237–39 (Stevens, J., dissenting). Congress's pattern of enacting unconstitutional legislation, in Justice Stevens's view, negated the ordinary presumption that the history of legislative enactments on a given subject provide clues to the limitations on Congressional power over that subject. See *id.* at 237 (Stevens, J., dissenting).

¹⁶³ See *id.* at 239–40 (Stevens, J., dissenting).

patented works at the expiration of the terms specified when the exclusive privileges were granted. On the other hand, authors will receive the full benefit of the exclusive terms that were promised as an inducement to their creativity, and have no equitable claim to increased compensation for doing nothing more.¹⁶⁴

Finally, Justice Stevens noted that the majority's rationale necessarily implied that Congress could enact the functional equivalent of a perpetual copyright through repeated retroactive extensions of the term, an outcome he believed impossible to square both with history and with the Constitution's mandate that copyright protection subsist only for a "limited Time[.]"¹⁶⁵ And what the majority characterized as appropriate deference to legislative judgments as to the proper duration of the copyright term, Justice Stevens instead saw as abdication of the Court's obligation to ensure that enacted legislation did not overstep constitutional bounds.¹⁶⁶

Justice Breyer's dissent focused on the CTEA's burdensome effects upon expression. Although concerns regarding legislative incursions on free expression were more often associated with First Amendment cases, such concerns were hardly foreign to copyright discourse; indeed, Justice Breyer recognized, the Supreme Court itself had linked the two, remarking that "the Framers intended copyright itself to be the engine of free expression."¹⁶⁷ In Justice Breyer's view, copyright's central aim was to foster the dissemination and reuse of expressive works by others in order to promote the constitutional values of "knowledge and learning."¹⁶⁸ To focus merely on the rewards that copyright provided to authors was to miss the point of the law, for "[t]he 'reward' is a means, not an end. . . . copyright statutes must serve public, not private, ends[.]"¹⁶⁹ Justice Breyer, accordingly, proposed to evaluate whether the CTEA bestowed primarily private rather than public benefits, whether it risked "seriously . . . undermin[ing]" the public's expressive interest in knowledge and learning, and whether it promoted other objectives relevant to the constitutional purpose.¹⁷⁰

Justice Breyer found that copyright law burdened the public's expressive interests in at least two respects: by granting rewards to authors that may have been greater than necessary to induce creation of their work, and by requiring authors' permission (backed up, in most cases, by

¹⁶⁴ *Id.* at 240 (Stevens, J., dissenting).

¹⁶⁵ *See id.* at 241–42 (Stevens, J., dissenting); U.S. Const. Art. I, § 8, cl. 8.

¹⁶⁶ *See Eldred*, 537 U.S. at 242 (Stevens, J., dissenting); *cf. supra* notes 150–151 and accompanying text.

¹⁶⁷ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (quoted in *Eldred*, 537 U.S. at 244 (Breyer, J., dissenting)); *but cf. supra* notes 157–158 and accompanying text (finding copyright exceptions, not copyright protection itself, better indicative of the law's "accommodations" with expressive interests).

¹⁶⁸ *See Eldred*, 537 U.S. at 245 (Breyer, J., dissenting).

¹⁶⁹ *Id.* at 245, 247 (Breyer, J., dissenting).

¹⁷⁰ *See id.* at 245 (Breyer, J., dissenting).

a demand for compensation) as a condition of using the work.¹⁷¹ Both of these factors increased the effective cost the public must pay to use a work, and both costs had been further increased by the CTEA. Because the CTEA retroactively lengthened the duration of past copyrights, however, Justice Breyer believed that the public would receive essentially nothing in exchange for the higher costs it would have to bear to use pre-existing works during the newly extended copyright term.¹⁷² Furthermore, the greater costs would apply not only to that subset of copyrighted works that had continuing commercial value, but to all works. Even works of limited commercial worth, however, might be of significant interest to historians, artists, teachers, and archivists—groups whose uses of the works were most likely to yield broader social benefits. By raising the cost of such socially valuable uses of older copyrighted works (including the costs of locating the current rights holders for works created decades earlier), the CTEA significantly burdened the public without providing an offsetting benefit.¹⁷³

Although the majority downplayed the extent to which the CTEA impaired expressive interests,¹⁷⁴ Justice Breyer found the majority’s reasoning unpersuasive. The statutory exception authorizing certain library copying, for example, contained so many built-in limitations and exceptions as to be essentially meaningless.¹⁷⁵ And the majority’s invocation of the fair use rule and the idea/expression dichotomy, which it proffered as evidence of copyright’s compatibility with First Amendment concerns, did nothing, in Justice Breyer’s view, to “help those who wish to obtain from electronic databases material that is not there” due to the CTEA’s new restrictions.¹⁷⁶ Justice Breyer believed that, by causing “harm to efforts to preserve and to disseminate works that were created long ago[,]”¹⁷⁷ the CTEA impaired expressive reuses of existing works to a far greater extent than the majority recognized.

Of course, regulations of every type impose costs and burdens on the regulated conduct. Justice Breyer searched in vain, however, for any broader public benefit adequate to justify the expressive burdens the CTEA created. Rejecting the argument that the CTEA provided an incentive for the creation of future expressive works, Justice Breyer argued that “[n]o potential

¹⁷¹ See *id.* at 248 (Breyer, J., dissenting).

¹⁷² See *id.* at 248–49 (Breyer, J., dissenting) (criticizing wealth transfer effect of statute, which he predicted would yield unearned windfalls to past creators).

¹⁷³ See *id.* at 249–52 (Breyer, J., dissenting). In his opinions, Justice Breyer has mostly avoided a common rhetorical error made by many other judges, in which the public interest is described as merely a proxy for the interests of authors in controlling exploitation of their works. See, e.g., Sherwin Siy, *Two Halves of the Copyright Bargain: Defining the Public Interest in Copyright*, 31 CARDOZO ARTS & ENT. L.J. 683, 684–87 (2013) (criticizing courts and other policy makers for conflating the two).

¹⁷⁴ See *supra* notes 156–160 and accompanying text.

¹⁷⁵ See *Eldred*, 537 U.S. at 252 (Breyer, J., dissenting) (discussing 17 U.S.C. § 108(h)).

¹⁷⁶ See *id.* at 253 (Breyer, J., dissenting).

¹⁷⁷ *Id.* at 254 (Breyer, J., dissenting).

author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.”¹⁷⁸ Relying on calculations proffered by a group of economists in an *amicus* brief, he estimated that “a 1% likelihood of earning \$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.”¹⁷⁹ Justice Breyer found that the legislative record gave Congress no basis on which to conclude that this modest additional sum would have altered the calculus underlying any prospective author’s decision whether to create a work;¹⁸⁰ and in any event, the benefits were too slight and speculative to offset the CTEA’s real burdens on expression.¹⁸¹ He believed that the statute’s defenders had overstated the benefits of matching the term of copyright in the United States to that of European nations, which had enacted a life-plus-70 term some years earlier.¹⁸² Justice Breyer rejected the argument that lengthening the copyright term would lead publishers to continue distributing the protected works, finding it incompatible with the constitutional purpose and unsupported by the available data.¹⁸³ Finally, although recognizing that Congress had recently employed copyright law as a tool to advance the interests of American companies in international trade, Justice Breyer declared that he “[ou]nd nothing in the Copyright Clause that would authorize Congress to enhance the copyright grant’s monopoly power, likely leading to higher prices both at home and abroad, *solely* in order to produce higher foreign earnings. . . . The Clause seeks public, not private, benefits.”¹⁸⁴

2. *Kahle v. Gonzales*

Although the result in *Eldred v. Ashcroft* surely disappointed advocates of robust protections for the public domain,¹⁸⁵ the majority opinion contained some favorable language. Most notably, the Supreme Court, consistent with the consensus of scholarly opinion, rejected the lower court’s holding that copyright statutes were immune from constitutional scrutiny under the First Amendment.¹⁸⁶ Although the Court ultimately rejected Eldred’s First Amendment-based challenge to the CTEA, it did so on the ground that “in this case, Congress has not altered the traditional contours of copyright protection”¹⁸⁷—inviting the inference that if Congress did enact

¹⁷⁸ *Id.* (Breyer, J., dissenting).

¹⁷⁹ *Id.* at 255 (Breyer, J., dissenting) (emphasis in original).

¹⁸⁰ *See id.* at 255–57 (Breyer, J., dissenting).

¹⁸¹ *See id.* at 257 (Breyer, J., dissenting).

¹⁸² *See id.* at 257–60 (Breyer, J., dissenting).

¹⁸³ *See id.* at 260–62 (Breyer, J., dissenting).

¹⁸⁴ *Id.* at 262–63 (Breyer, J., dissenting) (emphasis in original).

¹⁸⁵ *See, e.g.,* LESSIG, *supra* note 104, at 243–46.

¹⁸⁶ *Compare supra* note 144 and accompanying text, *with supra* note 160 and accompanying text.

¹⁸⁷ *Eldred*, 537 U.S. at 221.

a statute “altering” copyright’s “traditional contours,”¹⁸⁸ First Amendment scrutiny would be appropriate.

*Kahle v. Gonzales*¹⁸⁹ involved a constitutional challenge to the 1998 CTEA¹⁹⁰ and the 1992 Copyright Renewal Act (“CRA”),¹⁹¹ based upon *Eldred*’s First Amendment rationale. The plaintiffs argued that both statutes dispensed with long-settled requirements that previously had fostered the entry of copyrighted works into the public domain, thereby altering a “traditional contour” of copyright protection. The “traditional contours” that Congress had changed were, first, the requirement that a rights holder file a renewal application to obtain copyright protection beyond the initial 28-year term, and second, the length of the additional term of protection thereby acquired. Understanding why the *Kahle* plaintiffs regarded these statutes as changes to copyright’s “traditional contours” requires a brief review of recent copyright history.

Congress began to convert copyright from an “opt-in” to an “opt-out” system of protection in the Copyright Act of 1976.¹⁹² Before the 1976 Act, copyright protection extended to a work only if that work’s author took affirmative steps to secure such protection. The predecessor statute, the Copyright Act of 1909, conditioned federal copyright protection on the author’s publication of the work with a valid notice of copyright.¹⁹³ The default position in copyright law thus matched that of patent law: expressive works and inventions both came into

¹⁸⁸ As Professor Netanel has noted, the *Eldred* Court’s reference to copyright’s “traditional contours” is quite opaque, and the Court’s opinion offered little guidance concerning how future courts or litigants could determine whether copyright legislation violated any applicable First Amendment standards. As he put it:

[O]ur current Copyright Act provides for a far longer copyright term, grants copyright protection to many more types of expressive works, imposes markedly fewer prerequisites for enjoying copyright protection, and accords copyright holders more exclusive rights than did U.S. copyright law through much of the nineteenth century. Viewed in that light, very little of today’s Copyright Act would fall within copyright law’s “traditional contours.”

Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1097 (2013); cf. *supra* note 74 and accompanying text. For attempts to give substantive content to the Court’s reference to “traditional contours,” see, e.g., Edward S. Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 365–68 (2008); William McGinty, *First Amendment Rights to Protected Expression: What Are the Traditional Contours of Copyright Law?*, 23 BERKELEY TECH. L.J. 1099, 1119–27 (2008) (finding that the Court’s reference to “traditional contours” implies a predominantly historical mode of review).

¹⁸⁹ 487 F.3d 697 (9th Cir. 2007), *superseding on denial of petition for rehearing en banc* 474 F.3d 665 (9th Cir. 2007).

¹⁹⁰ See *supra* note 129.

¹⁹¹ Pub. L. No. 102-307, tit. I, 106 Stat. 264, 264 (1992) [hereafter “Copyright Renewal Act”].

¹⁹² Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in 17 U.S.C.).

¹⁹³ See Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1075.

being unprotected by federal law,¹⁹⁴ and received protection only if their respective creators followed the steps prescribed by statute to create enforceable rights. Authors could “opt in” to copyright protection by observing the required formalities upon publication of their work; conversely, an author’s publication of a work without complying with the applicable statutory formalities prevented copyright rights from attaching and effectively left the work in the public domain.¹⁹⁵

Its historical insistence that authors comply with statutory formalities (such as a valid notice of copyright) before protection could attach placed the United States at odds with international copyright law, which disallowed the setting of such preconditions to copyright protection.¹⁹⁶ As the United States became a net exporter of intellectual property assets, however, Congress began to perceive an advantage for domestic producers in integrating the United States more closely into the international copyright regime.¹⁹⁷ Many of the changes enacted in the Copyright Act of 1976, such as the adoption of a unitary copyright term, were justified as necessary to bring United States law into line with international copyright norms.¹⁹⁸ In one of its most important alterations to then-existing law, the 1976 Act redefined the moment at which federal copyright protection attached to an expressive work: rather than requiring authors to publish their works and to observe certain formal requirements when doing so, the new statute provided that copyright protection attached to every work when “fixed in a tangible medium of expression.”¹⁹⁹ By extending copyright protection automatically to every expressive work upon fixation, the 1976 Act effectively ended the “opt-in” federal copyright system that existed under the 1909 Act.

Even the 1976 Act, however, still nominally required authors to include a notice of copyright when their works were published, although the statute permitted deficient notices to be cured during a specified period following publication.²⁰⁰ These remaining formal requirements

¹⁹⁴ Before the 1976 Act, expressive works were protectable by state law before publication, so the circumstances are admittedly not precisely parallel. The 1976 Act eliminated state-law systems of copyright protection for most purposes. *See* 17 U.S.C. § 301 (2012).

¹⁹⁵ *See generally* Armstrong, *supra* note 77, at 388–89.

¹⁹⁶ *See supra* note 115 and accompanying text.

¹⁹⁷ For much of its early history the United States, like many other developing nations, purposefully maintained comparatively weak protections for intellectual property rights (especially for foreign creators) as a form of subsidy to domestic producers. *See, e.g.*, KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 34–35 (2000); Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 29–30 & n.42 (2004) (linking historical changes in United States copyright policy to interests of U.S. producers).

¹⁹⁸ *See, e.g.*, H.R. Rep. No. 94-1476, at 135, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5751.

¹⁹⁹ 17 U.S.C. § 102(a).

²⁰⁰ *See* Armstrong, *supra* note 77, at 389 & nn.166–68.

were swept away in 1989 under the Berne Convention Implementation Act (“BCIA”).²⁰¹ The combination of the 1976 Act’s provision recognizing copyright protection from the moment of fixation and the BCIA’s elimination of even those weak formal requirements that survived the 1976 Act essentially completed the transformation of copyright in the United States from an “opt-in” to an “opt-out” system of protection.²⁰²

The statutes at issue in *Kahle* made further alterations to the copyright system which, the plaintiffs contended, upset its “traditional contours.” Before the Copyright Renewal Act, the filing of a renewal application was necessary to extend the term of copyright in a pre-1978 work beyond an initial 28-year period of protection.²⁰³ The CRA eliminated this renewal requirement for all works that were still in their initial 28-year term of protection in 1992—which is to say, works published under copyright between 1964 and 1977, inclusive.²⁰⁴ The statute’s effect on the scope of the public domain was dramatic, because most authors never renewed their copyrights.²⁰⁵ Before the CRA, failure to file a renewal application left the work in the public domain after the initial 28-year term of protection expired.²⁰⁶ By making renewal automatic, the CRA thus extended the term of copyright for that majority of works that would otherwise have entered the public domain 28 years after publication.²⁰⁷ At the time of the CRA, the automatic renewal added a further 47 years to the duration of every copyright for works published between 1964 and 1977.²⁰⁸

²⁰¹ Pub. L. No. 100-568, 102 Stat. 2853 (1988) [hereafter “Berne Convention Implementation Act”]. The statute became effective March 1, 1989. *See id.* § 13(a) (codified at note following 17 U.S.C. § 101).

²⁰² *See Armstrong, supra* note 77, at 388–90. Indeed, even the “opt out” label may no longer accurately characterize the law, because it is uncertain under the present statutory language whether an author who wishes to “opt out” of copyright protection may do so. *See id.* at 391; *but cf. supra* note 67 and accompanying text.

²⁰³ *See Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (summarizing historical evolution of copyright duration rules); *Martha Graham School & Dance Found., Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624, 632–33 (1st Cir. 2004) (same).

²⁰⁴ Copyright Renewal Act, *supra* note 191, § 102(g)(2), 106 Stat. at 266 (codified at note following 17 U.S.C. § 101); *see also Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); 1 PATRY ON COPYRIGHT § 1:92 (2014).

²⁰⁵ *See LANDES & POSNER, supra* note 64, at 242 & fig. 8.8 (illustrating that renewal applications were filed only for a minority of those works eligible for renewal); Sprigman, *supra* note 114, at 499 & fig. 3.

²⁰⁶ *See, e.g., G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir. 1951).

²⁰⁷ *See Kahle*, 487 F.3d at 699.

²⁰⁸ *See Copyright Renewal Act, supra* note 191, § 102(a), 106 Stat. at 264–65 (amending 17 U.S.C. § 304(a)). By automatically granting a 47-year renewal term to works created between 1964 and 1977 as to which no renewal application was filed, the Copyright Renewal Act extended the duration of copyright in every such work from 28 to a total of 75 years—effectively postponing by two generations or more the entry of such works into the public domain.

The CTEA further slowed the entry of works into the public domain by adding 20 years to the duration of all copyrights then in force.²⁰⁹ Works created between 1964 and 1977, which received a second copyright term automatically under the Copyright Renewal Act, received a second term that was even longer than the law provided at the time the works were created. This further restriction of copyrighted works from passing into the public domain was also the subject of the plaintiffs’ “traditional contours” First Amendment challenge in *Kahle*.²¹⁰

The Court of Appeals panel found the plaintiffs’ First Amendment challenges to both the CRA and CTEA to be foreclosed by *Eldred*.²¹¹ The court’s discussion of the First Amendment issue occupies just five paragraphs of its opinion,²¹² a cursory treatment that apparently rested on the assumption that the parallels between *Eldred* and the plaintiffs’ CRA and CTEA challenges were too obvious to require elaboration. That assumption may have been at least tolerably apt with respect to the *Kahle* plaintiffs’ CTEA challenge; the lengthening of existing copyright terms by 20 years survived First Amendment scrutiny in *Eldred*, and the same statute was at issue in *Kahle*.²¹³

With respect to the CRA challenge, however, the *Kahle* panel’s attempt to draw a parallel with *Eldred* appears more strained. The CRA, of course, was not before the Court in *Eldred*. In order to bring the CRA within the scope of the reasoning enunciated in *Eldred*, the *Kahle* panel had to characterize the CRA as “plac[ing] existing copyrights in parity with those of future works.”²¹⁴ This characterization of the statute is not easily squared with its text, which expressly treats some past works—those published between 1964 and 1977—differently from all others,²¹⁵

²⁰⁹ See *supra* notes 130–131 and accompanying text.

²¹⁰ See *Kahle*, 487 F.3d at 699–700.

²¹¹ See *id.* at 698 (“The Supreme Court has already effectively addressed and denied Plaintiffs’ arguments.”).

²¹² See *id.* at 700.

²¹³ See *supra* notes 156–160 and accompanying text. Even with respect to the CTEA challenge, however, the *Kahle* and *Eldred* cases are not perfect mirror images. Petitioners in *Eldred* nowhere addressed the question whether Congress had altered a “traditional contour” of copyright protection; nor could they, for the principle that changes to “the traditional contours of copyright protection” invite First Amendment scrutiny was coined by the *Eldred* majority itself. On this view, *Kahle* invited the Court of Appeals to do precisely what the majority in *Eldred* had not: namely, to give substantive content to the “traditional contours” test. Cf. *supra* note 188 and accompanying text. By instead treating the plaintiffs’ challenge as foreclosed by *Eldred*, the *Kahle* panel bypassed an opportunity to clarify the law.

²¹⁴ *Kahle*, 487 F.3d at 700; cf. *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (noting that CTEA’s blanket 20-year extension of all existing copyright terms “placed existing and future copyrights in parity”); *id.* at 196 (“in common with the 1831, 1909, and 1976 Acts, the CTEA’s new terms apply to both future and existing copyrights”).

²¹⁵ See *supra* note 204 and accompanying text. Under the CRA, both the absolute length of the copyright term for 1964–1977 works, as well as the way the duration is computed, differ from the corresponding rules governing pre-1964 or post-1977 works. Pre-1978 works enjoy a fixed term of federal copyright protection measured from the date of publication (with works published in 1963 or earlier entering the public domain if their copyrights are not renewed after the initial 28-year term of protection), while post-1977 works enjoy a different measure of protection

and which contains no provisions of relevance to future works. Perhaps *Kahle*'s characterization is tolerably accurate to the extent that the CRA treated alike all works *within the subset of those it singled out for special treatment*, although even this statement is, at best, an approximation in view of other provisions of the CRA that extend greater protections to some 1964–1977 works (those in respect of which a renewal application is filed) than to others (those whose copyrights are automatically renewed).²¹⁶ These distinctions between the claim at issue in *Kahle* and the challenge resolved by the Supreme Court's decision in *Eldred* passed unremarked upon in the *Kahle* panel's exceedingly brief analysis.²¹⁷ Although the plaintiffs' CRA challenge in *Kahle* arguably warranted closer scrutiny than the court gave it, the court's choice to frame the challenge as simply duplicative of the CTEA challenge rejected in *Eldred* effectively foreclosed further review.²¹⁸

The combined effects of the CRA and CTEA on the public domain warranted only glancing mention in the panel's opinion. The panel recognized the extent to which the statutes had contributed to changing the state of play, noting that before 1978, "[t]he majority of creative works were ... never copyrighted and only a small percentage were protected for the maximum term."²¹⁹ The panel further observed that "[e]liminating the renewal requirement dramatically increased the average copyright term and correspondingly decreased the number of works

consisting of a certain number of years following the death of the author of the work. *See supra* notes 130–131 and accompanying text. Far from treating past and present works alike, the CRA expressly preserved this disparity in the means by which copyright terms for pre-1978 and post-1977 works are computed.

²¹⁶ *See* Copyright Renewal Act, *supra* note 191, § 102(a), 106 Stat. at 265 (codified at 17 U.S.C. § 304(a)(4)(A)). Although the failure to file a copyright renewal application no longer results in the work falling into the public domain after the initial 28-year term of protection, it nevertheless has ongoing legal consequences. Under this provision of the CRA, proprietors who fail to file a copyright renewal application may no longer complain about licensees' continuing exploitation of derivative works prepared during the first copyright term. In contrast, proprietors who do file a renewal application may avail themselves of the rule of *Stewart v. Abend*, 495 U.S. 207 (1990), which requires the licensee to conclude a new agreement with the copyright holder in order to continue exploiting a derivative work during the renewal term of the underlying copyright in some circumstances.

²¹⁷ The extension of the total duration of copyright entailed by the CRA's elimination of the renewal requirement also created a quantitatively more substantial change to the total length of the copyright term than was before the Supreme Court in *Eldred*. Those 1964–1977 works for which no renewal application was filed (which is to say, the great majority of such works) saw their copyright terms nearly trebled under the CRA, from 28 to 75 years. *See supra* note 208 and accompanying text. This extension exceeds, in both absolute terms and as a percentage of the unmodified original duration, the 20-year extension under the CTEA.

²¹⁸ *Cf.* Alfred C. Yen, *A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement*, 12 VAND. J. ENT. & TECH. L. 947, 964 n.89 (2010) ("Kahle has relatively little to say about when a court should apply elevated First Amendment scrutiny to copyright legislation because the Ninth Circuit saw the case as an attempt to re-litigate *Eldred*. It would therefore be incorrect to read *Kahle* as standing for the proposition that all First Amendment review of copyright legislation should be deferential.").

²¹⁹ *Kahle*, 487 F.3d at 699; *see also supra* note 205 and accompanying text.

currently entering the public domain.”²²⁰ Nevertheless, in the panel’s view, curtailing the entry of formerly copyrighted works into the public domain “d[id] not require further First Amendment scrutiny” because “traditional First Amendment safeguards such as fair use and the idea/expression dichotomy are sufficient to vindicate the speech interests affected by the CRA and the CTEA.”²²¹ In any event, for present purposes, the panel’s reasoning matters less than its result: given a choice between protecting private rights and the public domain, the panel gave the former greater weight. That is the same choice the *Eldred* majority made, even if the circumstances of the two cases were not quite as similar as the *Kahle* panel stated.

3. *Golan v. Holder*

In the last half century, Congress has acted repeatedly to bring United States intellectual property laws more into line with international treaties and norms.²²² One such international treaty, the Berne Convention, required (in Article 18(1)) that member nations extend copyright protection “to all works which, at the moment of [the Convention’s] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.”²²³ After the United States joined the Berne Convention effective March 1, 1989,²²⁴ questions arose concerning whether United States law adequately protected foreign works whose copyrights had not yet expired in their home countries. There was reason to believe that it did not, for some foreign authors had been determined to have no valid United States copyrights not because the term of protection had expired in the author’s home country, but because of the author’s failure to comply with the statutory formalities that United States law required, upon publication, for copyright protection to attach.²²⁵ The United States Government, however, took the position that the obligations stated in Article 18(1) of the Berne Convention were not mandatory,²²⁶ and the 1988 legislation that implemented the Berne Convention specifically did

²²⁰ *Kahle*, 487 F.3d at 699.

²²¹ *Id.* at 700 (citing *Eldred*, 537 U.S. at 219–20).

²²² See *supra* notes 196–202 and accompanying text; see also, e.g., Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 284, 285–87 (2011) (amending 35 U.S.C. § 102 to provide that United States patents shall be awarded to the first inventor to file a patent application, the priority rule that other nations have long applied).

²²³ Berne Convention, *supra* note 115, Art. 18(1). The Convention also provides, in Article 18(2), that member nations are not required to extend copyright protection to any work that had already entered the public domain in that nation through expiration of the copyright term. See *id.* Art. 18(2).

²²⁴ See *supra* note 201 and accompanying text.

²²⁵ See, e.g., *Lugosi v. Universal Pictures*, 603 P.2d 425, 427 & n.4 (Cal. 1979) (noting that Bram Stoker’s 1897 novel *Dracula*, although validly copyrighted in the author’s home country of England until 1962 (50 years after the author’s death), had always been in the public domain in the United States due to the author’s noncompliance with the deposit requirement of United States copyright law).

²²⁶ H.R. Rep. No. 100-609, at 51 (1988) (“there is considerable debate over whether any recognition of the ‘principle’ of Article 18(1) of the Convention is absolutely required in light of the sweeping discretion accorded states by Article 18(3)”; see also Library of Congress, Copyright Office, Final Regulation, *Restoration of Certain*

not extend copyright protection to “any work that is in the public domain in the United States.”²²⁷ The nation’s failure to extend copyright protection to all foreign authors whose works remained under copyright in their home countries was a source of lingering tension in the United States’ relations with its trading partners.²²⁸

The completion of the Uruguay Round of international trade negotiations²²⁹ in 1994 brought a commitment by the United States to several new treaties. Most prominent for present purposes was the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which for the first time brought the rules of intellectual property under the umbrella of the global trade system.²³⁰ Article 9(1) of the TRIPS Agreement provided, in part, that “[m]ember nations shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”²³¹ This language raised renewed questions about the United States’ adherence to Article 18(1) of the Berne Convention and its mandate to extend copyright protection to works of foreign authors whose copyrights in their home countries had not yet expired. Abandoning the pretense that such provisions were merely optional, the United States moved swiftly to amend its copyright statutes to bring itself more fully into compliance with the Berne Convention.

Section 514 of the Uruguay Round Agreements Act (“URAA”)²³² amended the copyright statute to provide for the “restoration” of United States copyright protection in foreign works that had previously lost United States copyright protection for specified reasons other than the expiration of copyright in the author’s home country. Specifically, the statute identified as eligible for restoration of United States copyright protection those works of foreign authors that were in the public domain due to noncompliance with formalities, failure to renew, lack of proper copyright notice, failure to observe manufacturing requirements, lack of subject matter

Berne and WTO Works, 60 Fed. Reg. 50,414, 50,416 (Sept. 29, 1995) (“The United States arguably failed to conform its law fully to the Berne Convention in 1989 when it declined to interpret Article 18(1) on restoration as being mandatory.”) (footnote omitted).

²²⁷ See Berne Convention Implementation Act, *supra* note 201, § 12, 102 Stat. at 2860 (codified at note following 17 U.S.C. § 101).

²²⁸ See, e.g., Thomas Gordon Kennedy, Note, *GATT-Out of the Public Domain: Constitutional Dimensions of Foreign Copyright Restoration*, 11 ST. JOHN’S J. C.R. & ECON. DEV. 545, 553–54 (1996); Paul J. Slevin & Eric J. Weisberg, *GATT Implementation Bill Restores Copyright in Foreign Works*, 42 J. COPYRIGHT SOC’Y U.S.A. 272, 272–73 (1995).

²²⁹ See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1996).

²³⁰ An overview of the TRIPS Agreement is available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (visited May 1, 2014). The text of the agreement is available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereafter “TRIPS Agreement”].

²³¹ TRIPS Agreement, *supra* note 230, Art. 9(1).

²³² Pub. L. No. 103-465, 108 Stat. 4809, 4976–81 (1994) (codified as amended at 17 U.S.C. § 104A (2012)).

protection (only with respect to pre-1972 sound recordings), or lack of national eligibility.²³³ The statute specifically denied restoration of United States copyright protection to any foreign work that was “in the public domain in its source country *through expiration of term of protection*[.]”²³⁴ Those foreign works which qualified for restoration of copyright protection received a new United States copyright beginning (in general) on January 1, 1996,²³⁵ and thereafter “subsist[ing] for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.”²³⁶ In recognition of the fact that some United States users of foreign copyrighted works may have relied to their detriment on the fact that those works were in the public domain in the United States, the URAA shielded such users from liability for copyright infringement if they discontinued any infringing activity within twelve months after the publication of a notice by the foreign author of a restored work that the author intended to enforce her copyright.²³⁷ The URAA also created a compulsory license scheme permitting derivative works based upon any foreign restored work to continue to be exploited so long as “reasonable compensation” was paid to the foreign author.²³⁸ Neither URAA provision aimed ostensibly at protecting parties who had relied on the public domain status of restored works, however, permitted continued use of such works without the payment of a royalty.

Because the URAA effectively removed expressive works from the public domain and forbid them to be used without payment to a private party, it raised substantial questions concerning legislative power. Indeed, in *Graham v. John Deere Co.*, the Supreme Court had suggested that any law diminishing the public domain would exceed the bounds of Congressional power under the Constitution’s Progress Clause. There, the Court wrote:

[T]he federal patent power stems from a specific constitutional provision . . . which authorizes the Congress “To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.” Art. I, § 8, cl. 8. The clause is both a grant of power and a limitation The Congress in the exercise of the patent power

²³³ 17 U.S.C. § 104A(h)(6)(C) (2012) (defining “restored work”).

²³⁴ *Id.* § 104A(h)(6)(B) (emphasis added).

²³⁵ *See id.* § 104A(a)(1)(A) (“Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.”), (h)(2) (defining “date of restoration” as January 1, 1996, if the foreign author’s home country was on that date a party to the Berne Convention or a member country of the WTO; or as a later date when either of those conditions became effective with respect to the author’s home country). Section 104A(g) empowered the President of the United States to declare that particular foreign countries had become eligible for restoration of their authors’ copyrights in the United States.

²³⁶ *Id.* § 104A(a)(1)(B).

²³⁷ *Id.* § 104A(d)(2), (e).

²³⁸ *Id.* § 104A(d)(3). *See generally* *Dam Things from Den. v. Russ Berrie & Co.*, 290 F.3d 548, 554–55 (3d Cir. 2002) (explaining operation of URAA’s provisions on restoration of copyright in foreign works).

may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. *Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.* Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must “promote the Progress of . . . useful Arts.” This is the *standard* expressed in the Constitution and it may not be ignored.²³⁹

This suggestion that the borders of the public domain are guarded by interests of constitutional magnitude could have been read to suggest a basis for striking down Section 514 of the URAA, insofar as that statute expressly extended copyright protection to works that had for many years been in the public domain in the United States (although copyrighted elsewhere).

A group of plaintiffs who contended that their livelihoods depended upon continued free use of foreign restored works filed a lawsuit challenging Section 514 on constitutional grounds. Upholding the statute, a district court determined that the above-quoted language from *Graham v. John Deere* was irrelevant where Congress removed copyrightable expression, rather than patentable knowledge, from the public domain, and where Congress had previously sought to close perceived gaps in federal copyright protection after the fact.²⁴⁰ The court also rejected plaintiffs’ contention that Section 514 unconstitutionally burdened free expression, although it did so essentially without analysis, simply declaring it to be a “settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns.”²⁴¹

A court of appeals panel reversed and remanded, finding that the URAA presented troubling First Amendment issues that could not be dismissed as easily as the district court suggested.²⁴² Citing the Supreme Court’s decision in *Eldred*, the panel reasoned that copyright legislation invites First Amendment scrutiny if it “altered the traditional contours of copyright

²³⁹ *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966) (footnote omitted, first emphasis added); *see also, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) (“that which is in the public domain cannot be removed therefrom by action of the States”). This is the principle, recall, that Justice Stevens deemed incompatible with the majority’s reasoning in *Eldred*. *See supra* note 162 and accompanying text.

²⁴⁰ *Golan v. Gonzales*, 2005 WL 914754, **5, 14 (D. Colo. Apr. 20, 2005) (“On the whole, Congress has historically demonstrated little compunction about removing copyrightable materials from the public domain.”).

²⁴¹ *Id.* at *17 (citing *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)). Curiously, the district court’s opinion took no account of the fact that the Supreme Court had expressly disapproved of *Eldred v. Reno* on this very point. *See supra* notes 144, 160 and accompanying text.

²⁴² *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

protection.”²⁴³ In contrast to the *Kahle* panel, the *Golan* panel sought to give substantive content to the “traditional contours” test. The panel reasoned that the reference to “tradition” suggested that “Congress’s historical practice with respect to copyright and the public domain must inform our inquiry.”²⁴⁴ That historical practice, in the panel’s view, revealed a consistent “copyright sequence” recognized by every statute prior to the URAA: “[a] work progressed from 1) creation, 2) to copyright, 3) to the public domain.”²⁴⁵ By reversing the second and third steps, the panel believed, the URAA altered the “bedrock principle . . . that works in the public domain remain there[.]”²⁴⁶ The panel supported its historical understanding of the traditional copyright sequence by referring to many cases standing for the general proposition that copyright protection cannot extend to material in the public domain.²⁴⁷ Turning next to the history of the copyright statutes, the panel found therein no evidence of a “tradition of removing works from the public domain.”²⁴⁸ The historical record surrounding the Copyright Act of 1790 was too muddled to support definitive conclusions one way or the other.²⁴⁹ Nor did the panel regard it as significant that Congress had occasionally conferred copyrights on authors in private acts,²⁵⁰ or that Congress had given some foreign authors the power to correct deficient formalities when the ordinary deposit procedure was disrupted by the two world wars.²⁵¹ Finding that plaintiffs’ rights to engage in artistic expression encompassed “a First Amendment interest in using works in the public domain,”²⁵² an interest arguably impaired by the URAA and not adequately protected by what the Supreme Court labeled the “built-in free speech safeguards” of copyright law,²⁵³ the panel remanded the case to the district court to conduct a new First Amendment analysis under proper standards.

²⁴³ *Id.* at 1187 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)) (internal quotations and citation omitted).

²⁴⁴ *Id.* at 1189.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1187.

²⁴⁷ *See id.* at 1189–90.

²⁴⁸ *Id.* at 1191.

²⁴⁹ *Id.* at 1190–91; *see also id.* at 1191 (“the answer to the question of whether Congress thought it was removing works from the public domain [at the time of the 1790 Act] is probably not just unclear but also unknowable.”).

²⁵⁰ *Id.* (“Far from providing evidence that copyrighting works in the public domain is within the traditional contours of copyright protection, the fact that individuals were forced to resort to the uncommon tactic of petitioning Congress demonstrates that this practice was *outside* the normal practice.”).

²⁵¹ *See id.* at 1191–92.

²⁵² *Id.* at 1193.

²⁵³ *Id.* at 1194 (quoting *Eldred*, 537 U.S. at 221 (internal quotations omitted)).

On remand, the district court struck down the statute.²⁵⁴ Because the parties agreed that the URAA imposed a content-neutral restriction on speech, the district court asked whether the statute “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”²⁵⁵ The court accepted the government’s argument that the URAA was enacted to bring the United States into compliance with the Berne Convention.²⁵⁶ Although the statute protected the plaintiffs’ interests in expressive reuse of foreign works insofar as it gave them the right to continue exploiting such works during the one-year window following the filing of a restoration notice by a foreign copyright holder, and to continued exploitation of a derivative work indefinitely upon payment of a licensing fee,²⁵⁷ the district court believed that these protections still “le[ft] unprotected a substantial amount of speech not tied to the Government’s interest.”²⁵⁸ The district court then noted that the Berne Convention appeared to grant member nations great discretion in determining how, and upon what conditions, to recognize copyrights in works of foreign authors that were still copyrighted in those authors’ home countries.²⁵⁹ Rather than taking advantage of that discretion to preserve the plaintiffs’ reliance interests in reusing public-domain works, however, Congress legislated those interests out of existence. Because the URAA “suppresses the right of reliance parties to use works they exploited while the works were in the public

²⁵⁴ *Golan v. Holder*, 611 F. Supp. 2d 1165 (D. Colo. 2009).

²⁵⁵ *Id.* at 1170 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)) (internal quotations omitted).

²⁵⁶ *See id.* at 1172; *see also supra* notes 223, 231 and accompanying text.

²⁵⁷ *See Golan*, 611 F. Supp. 2d at 1173; *see also supra* notes 237–238 and accompanying text.

²⁵⁸ *Golan*, 611 F. Supp. 2d at 1173 (quoting *Eldred*, 537 U.S. at 256) (internal quotations omitted).

²⁵⁹ As already noted, Article 18(1) of the Berne Convention required member nations to extend copyright protection “to all works which . . . have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” *See supra* note 223 and accompanying text. The Berne Convention further provided, however, that in the absence of contrary agreements between member nations, “the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.” Berne Convention, *supra* note 115, Art. 18(3). Before the URAA, the United States’ position was that this language essentially excused it from complying with Article 18(1). *See supra* note 226 and accompanying text. Although the subsequent TRIPS Agreement appeared to impose a stricter obligation on member nations (*see supra* note 231 and accompanying text), the district court believed that considerable discretion remained:

I read Article 18, Section 3, as a grant of discretion to member nations to implement the Berne Convention’s directive—that the copyrights of foreign authors be restored so long as the term of copyright protection in the country of origin has not expired—in light of each member nation’s established corpus of copyright law. Such discretion is not limited by Article 18, Section 3, so long as the directive is applied within the bounds of existing law. In the United States, for example, it is not disputed that the restored copyrights must still be subject to the well-established First Amendment exceptions afforded by the fair-use doctrine and the idea/expression dichotomy.

Golan, 611 F. Supp. 2d at 1174 (citations omitted).

domain,” it was “substantially broader than necessary to achieve the government’s interest” in complying with the requirements of the Berne Convention.²⁶⁰ Finally, the district court rejected, as unsubstantiated by the evidence, two further justifications the government articulated in support of the statute—namely, that adherence to Article 18(1) was required in order to secure similar protection for United States authors in the copyright laws of other nations, and that the URAA served to correct historically inequitable treatment of foreign authors in the United States.²⁶¹

A different panel of the court of appeals reversed and upheld the statute.²⁶² After reviewing the history of the URAA and the course of the litigation to date, the panel turned to the question whether the “restoration” of foreign copyrights under Section 514 violated the First Amendment.²⁶³ As the district court had, the panel found that Section 514 imposed a content-neutral regulation of speech and that intermediate scrutiny was proper.²⁶⁴ The panel viewed the governmental interests at stake in enacting the URAA quite differently from the district court, however. The district court had determined that the only cognizable interest the government had shown to underlie Section 514 was the interest in adhering to international treaty commitments, while rejecting the government’s assertions that the statute also served to protect American authors in other countries and to correct historical inequities.²⁶⁵ In contrast, the court of appeals found the government’s interest in protecting the interests of American authors overseas to be well established and essentially case-dispositive.²⁶⁶

The panel stumbled at first in suggesting that American authors actually have a constitutional right to copyright protection,²⁶⁷ a proposition that, if read literally, would undermine long-settled precedents establishing that federal copyright protection exists as a matter of legislative grace.²⁶⁸ Even if the interests the statute sought to protect were not of

²⁶⁰ *Golan*, 611 F. Supp. 2d at 1175 (internal quotations and citation omitted).

²⁶¹ *See id.* at 1175–77; *cf. supra* note 197 and accompanying text (noting history of disparate treatment of domestic and foreign works under United States law).

²⁶² *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010). Judge Briscoe was a member of the panel that had remanded the case to the district court in 2007, and wrote the panel’s opinion when the case returned to the Tenth Circuit in 2010.

²⁶³ *See id.* at 1080–82.

²⁶⁴ *Id.* at 1083; *see also supra* note 255 and accompanying text.

²⁶⁵ *See supra* notes 256, 261 and accompanying text.

²⁶⁶ *See Golan*, 609 F.3d at 1083 (“We hold that the government has demonstrated a substantial interest in protecting American copyright holders’ interests abroad, and Section 514 is narrowly tailored to advance that interest.”).

²⁶⁷ *See id.* at 1084 (“Although plaintiffs have First Amendment interests, so too do American authors.”).

²⁶⁸ *See supra* note 71 and accompanying text; *see also, e.g., Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“the Congress did not sanction an existing right but created a new one”); LYMAN RAY PATTERSON,

constitutional magnitude, however, the panel found persuasive evidence in the legislative record that the national interest was impaired by the underprotection of American works in overseas markets.²⁶⁹ Because foreign governments had insisted upon full compliance with the Berne Convention by the United States as a condition of extending comparable copyright protections to American authors, the panel continued, Congress reasonably could have concluded that enacting Section 514 would lead to corresponding improvements in the protection of United States works abroad.²⁷⁰

The panel next determined that the statute was not broader than necessary to achieve the government's purpose. As the panel saw it, the burdens Section 514 imposed upon American users of foreign copyrighted works mirrored those Congress hoped foreign nations would impose on users of United States works, and that the legislative purpose would therefore be frustrated if those burdens were not imposed.²⁷¹ The panel gave no weight to the plaintiffs' contention, which the district court had judged highly significant, that the Berne Convention permitted each member nation to exercise a great deal of discretion in choosing how to implement its obligations under Article 18. In the panel's view, that contention presupposed that achieving Berne compliance was the only goal of the URAA, whereas the panel saw the statute as aimed more broadly at serving the interests of American authors in overseas markets.²⁷² The fact that other nations had achieved Berne compliance while protecting the interests of parties who had relied on the public domain status of foreign works did not demonstrate that Section 514 was insufficiently tailored because the intermediate scrutiny standard of review did not require the government to use the least restrictive means available.²⁷³ Because the statute advanced a

COPYRIGHT IN HISTORICAL PERSPECTIVE 198 (1968) ("The idea that pervades the statute [the Copyright Act of 1790] is that copyright is a government grant, a statutory privilege—not a right."); *id.* at 201–02 (noting that this characterization has been carried forward into subsequent legislation); Gordon, *supra* note 125, at 1535 ("Judges have failed to use the First Amendment to provide extensive protection for free expression in intellectual property cases, in part because they mistakenly find a warrant for strong 'authors' rights' in a philosophy of natural law."); Harry N. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790, 791–92 (1975) ("A long and uninterrupted line of cases holds unequivocally that, apart from common law protection for unpublished works, copyright protection is completely and solely a statutory matter and that copyright is . . . simply a creature of statute, wholly a matter of congressional discretion to grant or to withhold") (footnotes omitted). *But cf.* John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005) (arguing that emergence of fair use doctrine beginning in the mid-19th century began to reintroduce considerations of natural rights into copyright despite earlier cases' suggestions that the subject is wholly statutory).

²⁶⁹ See *Golan*, 609 F.3d at 1084–86.

²⁷⁰ *Id.* at 1086–90.

²⁷¹ *Id.* at 1090–91.

²⁷² *Id.* at 1091–92; *cf. supra* note 259 and accompanying text.

²⁷³ See *Golan*, 609 F.3d at 1092. The panel also disputed the premise of the challengers' argument, finding that even other nations' protections for reliance parties were qualified and conditional and did not more expansively protect speech than did the URAA. See *id.* at 1093.

substantial governmental interest without burdening substantially more speech than necessary, the panel concluded, the URAA survived First Amendment scrutiny.²⁷⁴

The Supreme Court affirmed by a 6–2 vote.²⁷⁵ Writing for the majority, Justice Ginsburg rejected constitutional challenges grounded both in the Progress Clause and the First Amendment. As to the former, the majority in *Golan* offered essentially the same rhetorical rebuff to the petitioners’ argument as the Court of Appeals had in *Kahle*: Justice Ginsburg declared that the challenge to Congress’s power to remove copyrighted works from the public domain was largely foreclosed by the Court’s conclusion in *Eldred* that Congress may lawfully extend the duration of existing copyrights.²⁷⁶ The majority also relied on the Copyright Act of 1790 and several private bills to support its contention that “[h]istorical practice” validated legislative removal of expressive works from the public domain.²⁷⁷ The majority also analogized to a series of cases decided in the early to mid-19th century which had upheld the grant of patent rights to inventions that had previously lost such protection, and rejected the suggestion that the Court’s later assertion in *Graham* that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain” cast doubt on the ongoing validity of those earlier precedents.²⁷⁸ Finally, the majority reiterated that the constitutional directive that copyright legislation “promote Progress” did not require that all copyright statutes must lead to the creation of new expressive works; rather, Congress could choose instead to “promote Progress” by rewarding publishers of past works.²⁷⁹

The majority turned next to the First Amendment issue. Unlike both lower courts, the Supreme Court devoted no attention to the question of which First Amendment standard of review applied.²⁸⁰ Instead, the *Golan* majority found in *Eldred* a broad level of tolerance for

²⁷⁴ *Id.* at 1094.

²⁷⁵ *Golan v. Holder*, 132 S. Ct. 873 (2012). Justice Kagan recused herself. *See id.*

²⁷⁶ *See id.* at 884 (“Our decision in *Eldred* is largely dispositive of petitioners’ limited-time argument.”); *cf. supra* notes 211–218 and accompanying text.

²⁷⁷ *Golan*, 132 S. Ct. at 885–86; *cf. supra* notes 249–250 and accompanying text.

²⁷⁸ *Golan*, 132 S. Ct. at 886–87 (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966)). *Cf. supra* notes 162, 239 and accompanying text. The majority’s treatment of *Graham* is particularly unsatisfying insofar as the majority recast language that by its express terms at least purported to describe the outermost reach of legislative power under the Progress Clause and instead declared that it “did not speak to the constitutional limits on Congress’ copyright and patent authority.” *Compare Golan*, 132 S. Ct. at 887 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 202 n.7 (2003)), with *supra* note 239 and accompanying text; *see also* Robert F. Kappers, Note, *Is What You Give, Really What You Get? The Effect of Golan v. Holder on the Deterioration of the Public Domain*, 81 U. CIN. L. REV. 1053, 1073 (2013).

²⁷⁹ *Golan*, 132 S. Ct. at 887–89; *see also supra* note 154 and accompanying text.

²⁸⁰ *See supra* notes 255, 264 and accompanying text. *See also, e.g.*, Margot Kaminski, *Copyright Crime and Punishment: The First Amendment’s Proportionality Problem*, 73 MD. L. REV. 587, 600 (2013) (“Functionally,

legislation that burdens the reuse of copyrighted works, because such burdens increase the incentives for such works to be created and distributed in the first place.²⁸¹ And while the Court in *Eldred* had seemingly identified the idea/expression dichotomy and the fair use doctrine merely as illustrative examples of copyright law's "built-in First Amendment accommodations,"²⁸² in *Golan*, those two doctrines crystallized into the *only* exceptions to copyright protection that the First Amendment required Congress to honor.²⁸³

The majority next considered whether the petitioners' own long-term use of formerly public-domain works carried any constitutional weight. The Court's answer to that question was to declare that no one has any property right in a work in the public domain,²⁸⁴ and therefore, no one suffers a deprivation of a right when formerly public domain works are converted into private property. In the majority's words: "[a]nyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works."²⁸⁵ Moreover, the majority insisted, access to the restored works upon payment of a license fee to the new proprietor was a constitutionally adequate replacement for the free access that the petitioners had enjoyed before the enactment of the URAA.²⁸⁶ The inability to locate the

Eldred and *Golan* put most copyright regulations outside of First Amendment protection, as though copyright questions were an unprotected category of speech.") (footnote omitted).

²⁸¹ See *Golan*, 132 S. Ct. at 889–90. As already noted, the Court has been somewhat inconsistent in its statements as to whether copyright protection itself, or exceptions and limitations upon copyright holders' exclusive rights, better serve the goals of promoting free expression. See *supra* notes 90–94 and accompanying text. *Golan* offers little clarity on this point except to repeat that the Framers "saw copyright as an 'engine of free expression[.]'" *Golan*, 132 S. Ct. at 890 (quoting *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

²⁸² *Eldred*, 537 U.S. at 219–20; see also *supra* notes 157–158 and accompanying text; Birnhack, *supra* note 144, at 279–82 (recognizing these doctrines as necessary, but not sufficient, protections for expressive interests).

²⁸³ See *Golan*, 132 S. Ct. at 890–91 ("Section 514 leaves undisturbed the 'idea/expression' distinction and the 'fair use' defense.").

²⁸⁴ Cf., e.g., John J. Sierotnik, Note, *Golan v. Holder, the Copyright Clause, and the Changing Public Policy Underlying Copyright Law in the United States*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 411, 427–28 (2014) (noting debate before the URAA over whether the "public domain" might be characterized as property jointly owned by everyone).

²⁸⁵ *Id.* at 892. The majority's choice of language is puzzling; after all, enabling foreign authors to "acquire ownership rights" over formerly public-domain works was the avowed purpose and effect of the URAA, and the *Golan* petitioners' complaint was that, after the statute, they no longer enjoyed the "free access to the public domain" as it existed before the enactment of Section 514. The essence of the challenge raised in *Golan* was that the URAA upended the very system the majority described for all foreign works that had entered the public domain in the United States for any reason other than through the expiration of the statutory term of protection.

²⁸⁶ See *id.* at 893 (noting that even after the passage of the URAA, formerly public-domain works may continue to be used so long as "the right to [do so is] obtained in the marketplace").

authors of some works in order to conclude a license would be unfortunate, in the majority's view, but problems of that type were for Congress, not the Court, to remedy.²⁸⁷

Justice Breyer, joined by Justice Alito, dissented. Whereas Justice Breyer's dissent in *Eldred* had rested predominantly on First Amendment concerns,²⁸⁸ in *Golan* his arguments were grounded almost exclusively on the Progress Clause.²⁸⁹ In Justice Breyer's view, the pertinent standard by which to ascertain whether copyright legislation "promote[d] the progress of science"²⁹⁰ lay in determining whether it encouraged the production of new expressive works.²⁹¹ The works to which the URAA applied, however, consisted almost entirely of works whose publication preceded the statute's enactment, making it virtually impossible for the URAA to spur new creative production.²⁹² Although the statute could do nothing to stimulate new expression, its effects on the "millions" of past works to which it applied²⁹³ were pernicious: the statute would remove such works from the public domain and require would-be users of the works to locate and identify the foreign copyright holder (a potentially costly undertaking, especially for older works) and to negotiate individually for a license.²⁹⁴ The administrative costs alone of complying with the statute, in Justice Breyer's view, would deter many uses of the works to which the statute applied, including uses for socially beneficial purposes such as archiving and education.²⁹⁵ Still more serious was the statute's upsetting of the settled

²⁸⁷ See *id.* at 893–94.

²⁸⁸ See *supra* notes 167–177 and accompanying text.

²⁸⁹ While noting the existence of expressive harms caused by the statute, Justice Breyer gave them little independent weight. See *Golan*, 132 S. Ct. at 907–08 (Breyer, J., dissenting) ("For present purposes, I need not decide whether the harms to [speech-related] interest[s] show a violation of the First Amendment. I need only point to the importance of interpreting the Constitution as a single document—a document that we should not read as setting the Copyright Clause and the First Amendment at cross-purposes.").

²⁹⁰ U.S. Const. Art. I, § 8, cl. 8.

²⁹¹ See *Golan*, 132 S. Ct. at 899 ("In this sense, a copyright is, in Macaulay's words, a 'tax on readers for the purpose of giving a bounty to writers'—a bounty designed to encourage new production") (Breyer, J., dissenting); *id.* at 903 ("text, history, and precedent demonstrate that the Copyright Clause places great value on the power of copyright to elicit new production") (Breyer, J., dissenting).

²⁹² See *id.* at 903–04 (Breyer, J., dissenting).

²⁹³ See *id.* at 904 (noting estimates of number of foreign works whose copyrights would come into force in the United States under Section 514).

²⁹⁴ See *id.* at 904–06 (Breyer, J., dissenting).

²⁹⁵ See *id.* (Breyer, J., dissenting). Of course, at least some of the socially beneficial uses that Justice Breyer feared would be curtailed under the statute might nevertheless be excused under the fair use doctrine. See, e.g., *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013). Nevertheless, the unpredictability of fair use in practice may deter some lawful uses. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 565 n.66 (2008) ("Indeed, the very unpredictability of fair use outcomes may lead defendants to settle"); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1693–95 (1988).

expectations of users who had relied on the public-domain status of the restored works but would now be compelled to pay for the privilege of continuing to use such works.²⁹⁶

The dissent also read the historical record quite differently from the majority. Unlike the CTEA (which was at issue in *Eldred*) and the other statutes on which the majority relied, the URAA contained no provisions of general applicability to future works.²⁹⁷ Although *Eldred* stood for the proposition that Congress lawfully may maintain parity by applying the same 20-year term extension to both past and future copyrights alike, Justice Breyer saw nothing therein that supported singling out past works for uniquely advantageous treatment. He labeled “somewhat farfetched” the majority’s analogy to “private bills, statutes retroactively granting protection in wartime, or the like.”²⁹⁸ Rather, on Justice Breyer’s reading of the record, prior to the URAA, Congress had enacted “a virtually unbroken string of legislation preventing the withdrawal of works from the public domain.”²⁹⁹ And although the majority had suggested that Congress could reasonably conclude that providing new incentives for the dissemination of past works would ultimately serve the constitutional objective,³⁰⁰ Justice Breyer rejoined that extending copyright protection to a formerly public-domain work was more likely to limit than to enhance the availability of that work to the public.³⁰¹ Finally, echoing some of the criticisms articulated in the district court’s opinion on remand, Justice Breyer found that the putative conflict between the URAA and the requirements of the Constitution was essentially a problem the Government had brought upon itself by failing to exercise the Berne Convention’s provided flexibilities to protect the reliance interests of users of public-domain works.³⁰²

²⁹⁶ See *Golan*, 132 S. Ct. at 906 (Breyer, J., dissenting) (complaining that the URAA “reverses the payment expectations of those who used, or intended to use, works that they thought belonged to them”). Justice Breyer believed that this problem was simply not considered by Congress at the time it enacted the URAA. See *id.* at 907 (Breyer, J., dissenting) (observing that “Congress, with one minor exception, heard testimony only from the representatives of existing copyright holders, who hoped that passage of the statute would enable them to benefit from reciprocal treatment of American authors abroad”).

²⁹⁷ See *id.* at 908 (Breyer, J., dissenting) (“The [URAA] grants its ‘restored copyright[s]’ *only* to works *already* produced. It provides no monetary incentive to produce anything new.”).

²⁹⁸ *Id.* at 909 (Breyer, J., dissenting).

²⁹⁹ *Id.* (citations omitted).

³⁰⁰ See *supra* note 279 and accompanying text.

³⁰¹ See *Golan*, 132 S. Ct. at 909–10 (Breyer, J., dissenting); see also *id.* at 910 (Breyer, J., dissenting) (“This argument, whatever its intrinsic merits, is an argument that directly concerns a private benefit: how to obtain more money from the sales of existing products. It is not an argument about a public benefit, such as how to promote or to protect the creative process.”). Some research has offered support for Justice Breyer’s view that public domain works are more widely available for public use. See, e.g., Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 22–23 (2013); Paul J. Heald, *How Copyright Keeps Works Disappeared* (Illinois Public Law Research Paper No. 13-54, July 5, 2013), available at <http://ssrn.com/abstract=2290181>.

³⁰² See *id.* at 911–12 (Breyer, J., dissenting); cf. *supra* notes 259–260 and accompanying text.

Golan is a remarkable decision for many reasons. Considered together with *Eldred* and *Kahle*, it marks the third consecutive (and potentially most consequential) defeat for parties seeking to preserve the public domain against encroachment by proprietary claims. The fact that the decision upheld a statute that effectively took property that was already freely available for public use and instead converted that same property for private financial benefit led Duke Law School's Center for the Study of the Public Domain to sound this note of alarm:

What are the limits on this decision? Could Congress recall the works of Shakespeare, Plato, Mozart and Melville from the public domain, and create new legalized monopolies over them? It is hard to imagine anything more contrary to the First Amendment—would privatizing Shakespeare by government decree abridge freedom of speech?—or to the attitudes of those who penned the Copyright Clause that limits Congress's power to create new exclusive rights. Yet if one reads *Golan*, one searches in vain for any limiting principle on Congress's actions. In this decision, Justice Ginsburg's majority opinion effectively denies the public domain any meaningful Constitutional protection. Under the U.S. Constitution, says this case, the public domain is "public" only by sufferance. It may be privatized at any moment, at the whim of the Congress and without violating the Bill of Rights.³⁰³

Moreover, in both *Golan* and *Eldred*, the Court rebuffed First Amendment challenges to copyright legislation without even specifying the appropriate level of constitutional scrutiny, effectively carving out a special exemption from ordinary First Amendment analysis that seemingly applies only in copyright cases.³⁰⁴

Most fundamentally, *Golan* rests upon a crabbed and outdated understanding of the public domain. Of the four interests served by a robust public domain that were sketched out above,³⁰⁵ only the third—emphasizing the public domain's function as a repository of scientific truth and factual matter—receives even glancing recognition in *Golan*, through the majority's

³⁰³Center for the Study of the Public Domain, Duke Law School, *The Incredible Shrinking Public Domain*, at <https://web.law.duke.edu/cspd/publicdomainday/2013/shrinking> (last visited July 14, 2014); see also ROBERT SPOO, WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN 266–68 (2013) (discussing "startling" implications of *Golan* majority's rhetoric, which makes it "hard to imagine any limit to what Congress might choose to withdraw from the endangered commons").

³⁰⁴ See Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1115–27 (2010) (criticizing Court's "copyright exceptionalism"); see also *supra* note 125 and accompanying text. Of course, validly enacted federal legislation, including the CTEA and URAA, enjoys a presumption of constitutionality. See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000). Both *Eldred* and *Golan* go quite a bit further, however, in presuming that speech-regulating legislation need not be subjected to First Amendment analysis *at all* if enacted in the exercise of Congress's copyright power.

³⁰⁵ See *supra* notes 75–106 and accompanying text.

insistence that Congress preserve the idea/expression dichotomy and the fair use rule.³⁰⁶ One searches the *Golan* majority's opinion in vain for any glimmer of Judge Kozinski's recognition that restricting the public domain threatens creativity, or Judge Posner's concern that allowing the heirs of long-dead authors to extract excessive tolls from tomorrow's creators impoverishes us all.³⁰⁷ Would-be reusers of public domain material appear to the *Golan* majority as ungrateful freeloaders who believe that the Constitution entitles them to something for nothing. This is a vision unmoored from over two decades' worth of consistent, high-quality scholarship on the actual value of the public domain.

And so, in a nutshell, stands the fundamental issue dividing contemporary copyright law from the broadest strands in the consensus of expert opinion. Although most serious copyright scholarship engages, because it must, with the actual collection of treaties, statutes, and court decisions that govern the subject, the evidence and arguments that have apparently moved Congress and the courts to act strike most scholars as unpersuasive. For their part, Congress and the courts have seemed to be ignorant of, or even hostile to, the careful and thorough legal literature on the public domain that has blossomed in recent decades. Copyright law and copyright scholarship are conducting dueling monologues, not a dialogue, on the public domain.

B. Preserving the Public Domain

Examples of courts and policy-makers acknowledging the value and importance of the public domain, and the risks of construing copyright law in a fashion that cedes too much control over the developing information ecosystem to past publishers of expressive works, are more difficult to locate. When courts speak of the public domain in copyright cases, they typically do so only by way of fixing the outer boundary of the copyright holder's proprietary claims, rather than as an independent corpus of creative material that deserves support and protection.³⁰⁸ Nevertheless, although the overall trend remains strongly in the direction of greater proprietary control, other strands of argument do appear from time to time. The examples of Judges Kozinski and Posner emphasizing the importance of preserving the public domain against excessive proprietary incursion have already been mentioned,³⁰⁹ as has Justice Brandeis's admonition that

³⁰⁶ See *supra* note 283 and accompanying text. Although the Court's reference to the fair use doctrine might be taken as an effort to accommodate interests beyond mere reuse of factual matter, the fair use doctrine offers less than meets the eye here. The possibility that an accused infringer may ultimately prevail on a fair use defense (after being put to the burden of litigating the issue in circumstances where the outcome may not reliably be predicted, see *supra* note 295) entails materially greater risk to the would-be fair user than does the use of public domain materials as to which no infringement claim may be brought at all.

³⁰⁷ See *supra* notes 86, 87 and accompanying text.

³⁰⁸ See *supra* notes 62–63 and accompanying text.

³⁰⁹ See *supra* note 307 and accompanying text. Of course, in the cases cited, only Judge Posner's opinion commanded a majority; Judge Kozinski was dissenting from a decision which found that an electronics manufacturer's print advertisement potentially violated California's right of publicity law even though the claim was

“the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”³¹⁰

The copyright debate briefly spilled over into the realm of American partisan politics recently, doubtlessly exposing at least some observers to the competing arguments for the first time. In late 2012, the House Republican Study Committee issued a report entitled “Three Myths About Copyright Law and Where to Start to Fix It.”³¹¹ Consistent with the partisan orientation of the organization that issued the report, the author attacked what he characterized as “three myths” that had produced copyright rules at variance with American conservative political principles. The substance of the report’s critique, however, would be familiar to scholars across the political spectrum. The report argued that (1) copyright law had become inordinately focused upon providing financial returns to content producers rather than upon maximizing creativity and innovation; (2) the law contravened free-market principles by establishing a heavily regulated, government-provided monopoly; and (3) copyright law in practice slowed, rather than accelerated, creative output, scientific inquiry, digital preservation, added-value industries, and legitimate journalism and oversight.³¹² The report argued that the ever-lengthening terms of copyright (of the type the Supreme Court had upheld in *Eldred*) harmed knowledge and learning by barring free reuse of most works published during the last ninety years.³¹³ Keeping all such works out of the public domain, the report argued, also discouraged the development of new industries and technologies to access, annotate, and share such works.³¹⁴

Although commentators across the political spectrum praised the report,³¹⁵ it was withdrawn only one day later due to pressure from the content industries, and its author lost his job.³¹⁶ Again, the report reflected only the views of an individual House staffer and its recommendations have not formed the basis for any legislative proposals. But the now-withdrawn report nevertheless illustrates how the past generation of scholarship on the necessity of protecting the public domain may exert at least some influence among policy makers.

filed by an actor who did not actually appear in the advertisement. *See White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *reh’g denied*, 989 F.2d 1512 (9th Cir. 1993).

³¹⁰ *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (quoted *supra* note 63 and accompanying text).

³¹¹ Although the report was swiftly withdrawn by the Republican Study Committee, it was later published by the House staffer who wrote it. *See Derek Khanna, Republican Study Committee Policy Brief: Three Myths About Copyright Law and Where to Start to Fix It*, 32 CARDOZO ARTS & ENT. L.J. 1 (2013).

³¹² *See id.* at 3–7.

³¹³ *Id.* at 6.

³¹⁴ *Id.* at 7.

³¹⁵ *See Derek Khanna, Reflection on the House Republican Study Committee Copyright Report*, 32 CARDOZO ARTS & ENT. L.J. 11, 12–14 (2013).

³¹⁶ *See id.* at 14–15.

V. Can Copyright Reform Succeed?

In antitrust law, criticism of what scholars perceived to be consumer-unfriendly liability rules led to a wholesale transformation of legal doctrine along the lines that the critics preferred. In copyright, critiques of how existing legal rules harm the public, although forcefully articulated, have produced no comparable impact on policy. The question is, why not? Comparing the attributes of the two movements may suggest fruitful directions for further advocacy. This section will sketch out four families of possible explanations, one focused on the nature of the scholarly critique of copyright law and the others focused, in turn, on the branches of the federal government, each of which occupies a different role in the formulation of copyright policy. Within each family, one may identify points of both commonality and contrast with the revolution in antitrust law that bear closer examination.³¹⁷

A. Explanations Focusing on the Nature of Copyright Scholarship

The critical body of antitrust scholarship that emerged in the 1960s began almost immediately to influence the decisions of the courts in ways that continued to develop for several decades.³¹⁸ Perhaps the reason why the body of critical contemporary copyright scholarship has so far yielded no comparable results has to do with differing characteristics of the latter body of literature. That is, perhaps copyright scholarship differs from antitrust scholarship in ways that tend to diminish its relative impact on policy.

1. Locating the Consensus of Scholarly Opinion

One possibility that should be confronted, in the interest of intellectual honesty, is that my own perception of a critical consensus of disinterested expert opinion is actually in error. My own review of the scholarship on copyright law leads me to the conclusion that a rough but substantial consensus has formed around the desirability of protecting and expanding the public domain, a policy prescription that stands sharply at variance from the recent restrictive trend of copyright legislation and court decisions.³¹⁹ If the center of gravity in copyright discourse

³¹⁷ My position as a legal scholar rather than a political scientist or public policy researcher leads me to ground the inquiry that follows predominantly in legal terms, rather than primarily in terms of institutional prerogatives or interest-group dynamics. Where the topic under scrutiny concerns the formulation and implementation of policy in the real world, however, it may be impossible as a practical matter to avoid brushing up against domains that may be more developed outside legal discourse than within it. It is highly likely that the development of more robust answers to the questions raised in this section of the essay will depend critically upon the use of insights from academic domains different from my own.

For an example of recent work attempting to apply methodologies from other domains to the analysis of legal questions, see Daniel Martin Katz, Michael James Bommarito II, & Josh Blackman, *Predicting the Behavior of the Supreme Court of the United States: A General Approach*, available at <http://ssrn.com/abstract=2463244> (July 21, 2014).

³¹⁸ See generally *supra* notes 16–60 and accompanying text.

³¹⁹ See *supra* notes 75–106 and accompanying text.

actually rests elsewhere, in a position more hospitable to the ever-greater restrictions on the public domain that have been a hallmark of United States policy for decades, then it would be quite unsurprising for Congress and the courts to proceed as they in fact have. Although I have sought to avoid doing so, perhaps I have self-selected a subset of the extant copyright scholarship that happens to appeal to me and misidentified where the scholarly consensus actually rests.³²⁰

To the argument that my misapprehension of the location of the scholarly consensus explains the perceived resistance of Congress and the courts to that consensus, two responses might be made, neither of which requires acceptance of my perception of a disinterested expert consensus.³²¹

First, the example of the Chicago School's influence on antitrust law counters any notion that critical ideas must become part of the conventional wisdom before they exert influence on policy. Law-and-economics scholarship began to influence the courts in antitrust cases almost immediately, even if its full impact was not felt until some decades had elapsed.³²² Even as the law-and-economics movement was transforming antitrust law, however, its own core premises were the subject of vigorous and ongoing debate.³²³ Competing strands of scholarly opinion in antitrust continued waging rear-guard actions long after the Chicago School methodology had taken root in the case law.³²⁴ The point, again, is not to argue over whether the courts *should* have reoriented antitrust doctrine along the lines suggested by Chicago School economic theory

³²⁰ Cf. Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 317–20 (2009) (cautioning scholars on both sides of the intellectual property debate to avoid dividing themselves into insular and competing camps).

³²¹ Of course, I don't believe I am incorrect in perceiving a broadly shared scholarly consensus that that copyright law as presently constituted systematically undervalues the public domain and thereby disserves the public interest. If I am truly wrong about what most scholars believe, I can say only that many others suffer from the same confusion. See, e.g., *supra* note 120 and accompanying text.

³²² See *supra* notes 16–60 and accompanying text.

³²³ See, e.g., Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1 (1987) (summarizing and rebutting several challenges to the movement both inside and outside the legal academy in the 1970s); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 2–8 (1986) (identifying limits on value of economic analysis in addressing complex social problems); Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929 (suggesting that novelty of applying economic jargon in legal analysis challenged the ability of lawyers and judges to understand and articulate the law); cf. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 767–69 (1987) (arguing that insights from economics, philosophy, political science and other domains ultimately strengthen legal discourse).

³²⁴ See, e.g., Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995); Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1830–34 (1990) (criticizing executive enforcement actions and court decisions predicated upon Chicago School economic analysis); Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631 (1989); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 NYU L. REV. 936, 956–60 (1987).

as they in fact did. The point, rather, is simply to point out that that reorientation happened before, not after, Chicago-style law-and-economic analysis attained anything approaching the breadth of expert consensus that now prevails among copyright scholars on the law's underprotection of the public domain. Thus, even if I have incorrectly characterized the actual consensus of disinterested expert opinion in copyright law, the transformation of antitrust law based upon research that was not yet the subject of a similar consensus suggests that the existence of consensus is not dispositive.

Second, regardless of whether reform-oriented copyright scholars actually represent a numerical majority of disinterested experts, as I believe, those scholars' arguments have been painstakingly explained and developed in a voluminous and still-expanding body of professional literature and deserve a fair hearing in any forum that aspires to intellectual rigor. The quality of the arguments for protecting the public domain matters even more than their quantity. If the scholars whose views were briefly surveyed above are correct, then existing copyright law systematically under-protects the public domain, thereby both harming consumers and dampening technological innovation. The ideal of reasoned deliberation demands that an honest decision-maker explain why those scholars are actually incorrect before enacting or upholding further restrictions on the public domain. Intelligent rejoinders to the voluminous body of contrary scholarship, however, are precisely what is missing from court decisions such as *Eldred*, *Kahle*, and *Golan*. The cases' failure even to recognize, much less to rebut, the insights developed in the modern corpus of copyright scholarship on the public domain is itself a problem, irrespective of whether that corpus actually reflects (as I believe it does) the consensus of disinterested expert opinion.

2. Scholarship and Decision-making

A second response might explain the apparent lack of influence exerted by critical copyright scholarship by asking whether scholars' views actually matter to real-world decision-makers such as legislative bodies and courts. Chicago-School antitrust reformers of the 1960s and 1970s, the argument might run, wrote articles intended to be immediately useful to enforcement agencies and courts. Since that time, critics might continue, legal scholarship has become pedantic and abstruse, concerned less with practical application than with debating how many angels may dance on the head of a pin. This change in the nature of legal scholarship, a skeptical advocate might conclude, explains why antitrust scholarship succeeded in moving the courts where copyright scholarship has not.

Some judges, to be sure, have questioned the practical relevance of legal scholarship to real-world disputes. More than two decades have passed since Judge Harry Edwards said that courts had little use for the work of legal scholars,³²⁵ and others have taken up the refrain since

³²⁵ See Edwards, *supra* note 4. The intervening years have not softened Judge Edwards' views. See Harry T. Edwards, *Another Look at Professor Rodell's Goodbye to Law Reviews*, 100 VA. L. REV. 1483 (2014).

that time.³²⁶ By this point, perhaps the complaint that legal scholarship is irrelevant to legal practice has been repeated often enough to become a self-fulfilling prophecy: courts have been told so often that legal scholarship is whimsical, absurd, and divorced from reality that they may no longer even bother to investigate whether anything in the scholarly literature may be of assistance in deciding a pending case. On the other hand, some measures suggest that judicial citations to legal scholarship are increasing, or at least not declining, inviting the inference that

³²⁶ To take a widely reported example, Chief Justice John Roberts responded to a question about the disconnect between the legal academy and the judiciary by criticizing legal scholarship (while simultaneously admitting that he does not actually read it):

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I am sure was of great interest to the academic that wrote it, but isn't of much help to the bar . . . [I]f the academy is interested in having an influence on the practice of law and the development of law, that they would be wise to sort of stop and think, is this area of research going to be of help to anyone other than other academics. You know, it's their business, but people ask me, what the last law review article I read was, and I have to think very hard before I come up with one.

Annual Fourth Circuit Court of Appeals Conference, C-SPAN, at <http://www.c-span.org/Events/AnnualFourth-Circuit-Court-of-Appeals-Conference/10737422476-1/>, at 28:50 (June 25, 2011). Some scholars disputed the characterization. See, e.g., Danielle Citron, *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS, at <http://concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html> (July 1, 2011). Others have acknowledged at least some of the force of the criticism and offered proposals aimed at rectifying the perceived disconnect between the bench and the academy. See, e.g., John R. Nolon, Keith Hirokawa, & Sean Nolon, *Towards Engaged Scholarship*, 33 PACE L. REV. 821 (2013); Ross E. Davies, *In Search of Helpful Legal Scholarship, Part 2: Shall We Dance*, 2 J.L. 255 (2012). A puckish rejoinder to the Chief Justice is available in Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2D 251 (2015).

The Final Report of the American Bar Association's Task Force on the Future of Legal Education, issued in January 2014 but not yet adopted by the full ABA as of the date of this writing, also called for at least some law schools to deemphasize the production of scholarship, citing the benefits of greater heterogeneity among institutions and the need for greater cost-benefit scrutiny of faculty scholarly activity. See REPORT AND RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION 34 (Jan. 2014), at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf. Others, however, have challenged the notion that a de-emphasis on faculty scholarship will improve either educational outcomes or our system of justice:

We all are bombarded with data; consumed with information; and too often lack the time needed for reflection; the time needed to cultivate wisdom. The vision of a scholar in her garret has not lost its appeal. Nor has it lost its value. It is that scholar who has the time and freedom to reflect deeply on the law and wonder about the connection or connections between law and justice or about the nature and elements of a good society. In a word, we can call these reflections scholarship and they are the essential elements of a sound structure of legal education as distinct from legal training.

Joseph P. Tomain, *ABA Task Force on the Future of Legal Education, Working Paper (August 1, 2013)*, available at <http://perma.cc/J6J5-YU3U>.

some judges find this scholarship useful.³²⁷ Nevertheless, perhaps legal scholarship in general (and copyright scholarship in particular) simply holds less value today to decision-makers attempting to resolve real-world disputes.

This explanation, too, has some problems. If Judge Edwards's critique was ever valid as a general matter, it is certainly impossible to sustain as a description of contemporary copyright scholarship. Only someone ignorant of the current copyright literature could believe it to be a domain of airy, highfalutin theorizing. To the contrary, as Professor Ann Bartow has written:

The problem is not a lack of useful academic writings on the subjects within the purview of the Copyright Act. There are many brilliant law review articles that make a host of sensible normative recommendations, and many legal scholars have written trenchant critiques describing misinterpretations or misapplications of copyright law. But the practical effect of most of this work has generally been quite modest.³²⁸

The academic critique of how the courts and Congress have jointly restricted the public domain demonstrates that existing doctrine does real harm to real persons. Current law reduces the overall level of creative and innovative activity and impedes the dissemination of knowledge. This is what is actually happening in the world right now, today; and it will keep happening until the law improves. Scholars' concerns are far from unduly abstract or theoretical; to the contrary, they lie at the core of copyright law's constitutional purpose.

Moreover, even if a general belief in the irrelevance of legal scholarship leads courts not to seek out pertinent sources in a particular case, competent attorneys have every incentive to

³²⁷ Professors Lee Petherbridge and David Schwartz have explored this question from a variety of angles. See Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U.L. REV. 995, 1007–09 (2012); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1359–64 (2011). See also Wisdom, *supra* note 4.

³²⁸ Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 464 (2014); see also *id.* at 464–66 (responding to Chief Justice Roberts' criticism of legal scholarship and concluding that it "is especially true with copyright law" that "really good law review articles on important topics can be completely overlooked").

Professors Petherbridge and Schwartz recently found that during the last half century, the Supreme Court actually cited legal scholarship more frequently in copyright cases than in most other types of cases; a fact that is not easily squared with the contention that copyright scholarship has no value to courts. See Lee Petherbridge & David L. Schwartz, *The End of an Epithet? An Exploration of the Use of Legal Scholarship in Intellectual Property Decisions*, 50 HOUS. L. REV. 523, 540, 542 (2012); see also *id.* at 556–57 (hypothesizing possible explanations for the imbalance in the Court's citation patterns of copyright and trademark law scholarship). Although Professor Bartow's work, quoted above, again identifies the courts' overreliance on the *Nimmer on Copyright* treatise as an area of particular concern, this factor cannot explain the imbalance found in Professors Petherbridge and Schwartz's study, because their data set excluded citations to legal treatises. See *id.* at 539; see also Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581 (2004).

incorporate the insights from scholarship into their own arguments to the court, making it unlikely that those sources will remain forever unknown to the courts.³²⁹ The argument that scholarship has little worth and will be ignored by decision-makers, accordingly, seems to me to miss the mark in the copyright context.

3. Measuring the Impact of Copyright Law

A third possibility might be that the available academic copyright literature is insufficiently robust to serve as a reliable basis to guide or alter policy-making. Economics (and also “law-and-economics”) scholarship, such as the scholarship that guided the courts’ transformation of antitrust law, is filled with formulas and graphs that convey the appearance (and perhaps the reality) of analytical rigor. Economic scholarship served to quantify the trade-offs involved in competing legal regimes: tighter environmental laws, for instance, may confer social benefits by reducing exposure to toxins, but simultaneously exact social costs in the form of higher prices for the goods polluters produce. Developing the “optimal” environmental regime, economic analysis posits, entails quantifying and weighing the benefits versus the associated costs to determine which approach yields the greatest aggregate social utility.³³⁰ Perhaps the problem is that the extant copyright reform scholarship has not, as yet, reached the same level of analytical strength as the scholarship upon which the courts based their transformation of antitrust law. This possibility, to my mind at least, carries a little more force than the previous two; although it surely is not the whole story.

Copyright law is often said to rest upon a sort of psychological inference about what motivates creators to create: Authors whose works are unprotected against copying by others may decline to create those works in the first place, depriving society of the benefit of their creations. Conferring such protection via copyright, in contrast, provides an incentive that may motivate the creation of at least some expressive works that would otherwise never have been produced.³³¹ Because providing such incentives will yield collective benefits by increasing the

³²⁹ See, e.g., Jared Klaus, *Law Reviews: An Undervalued Resource*, OHIO LAW., May/June 2012, at 28.

³³⁰ A classic version of this analysis is available in WILLIAM F. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974).

³³¹ See, e.g., Richard Watt, *The Basic Economic Theory of Copyright*, in *HANDBOOK ON THE ECONOMICS OF COPYRIGHT: A GUIDE FOR STUDENTS AND TEACHERS* 9, 13 (Richard Watt, ed., 2014). My summary is not intended as an endorsement of the incentives rationale, which (as discussed below) has been questioned by more recent scholarship. Further complicating matters, the incentives rationale has frequently been joined in U.S. history with a second argument that characterizes creation as a morally praiseworthy activity deserving of reward for that reason alone. See, e.g., Stewart E. Stark, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996). This second argument is not easily squared with the Supreme Court’s clear disapproval of the so-called “sweat of the brow” doctrine in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 352–54 (1996) (declaring the investment of labor involved in the creation of a work to be irrelevant to the quantum of copyright protection that work receives). See also Stark, *supra*, at 1220–22 (arguing that *Feist* calls even the “incentives” theory of copyright into doubt).

production of expressive works, the argument runs, providing such incentives makes sense in the aggregate even if copyright protection increases the cost to a consumer of obtaining a work.

As a basis for a far-reaching legal regime with global effects on trade and cultural development, this basic syllogism—if *copyright, then more expressive works*—fairly cries out for supporting empirical detail.³³² Which creators must receive incentives in order to induce them to create?³³³ Which types of works will actually be under-produced if no incentives are supplied?³³⁴ Should we withhold incentives from works that we conclude would still be produced without them?³³⁵ If incentives are necessary, should they take the form of a statutory monopoly as copyright does, or are there less costly ways to stimulate the same level of creative output?³³⁶ How long must the incentives endure to secure the intended benefit?³³⁷ Do the strength and duration of necessary incentives vary among different types of expressive works?³³⁸ And finally,

³³² See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, ©COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY 1 (2013) (noting that the “strident debate over copyright’s proper scope and terms and means of its enforcement” “is poorly informed by independent empirical research”), available at <http://www.nap.edu/catalog/14686/copyright-in-the-digital-era-building-evidence-for-policy>.

³³³ Motion pictures, to take only one obvious example, result from the coordinated endeavors of the dozens or even hundreds of creators whose names appear in the credits. Yet films have only a single “author”; all the other contributors listed in the credits are legal strangers to the copyright. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232–36 (9th Cir. 2000); *Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609, 1612–14 (S.D.N.Y. 1999).

³³⁴ See, e.g., Stark, *supra* note 331, at 1213–15.

³³⁵ See, e.g., Matthew P. Larvick, *Questioning the Necessity of Copyright Protection for Software Interfaces*, 1994 U. ILL. L. REV. 187; Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 344 (1970) (noting apparent irrelevance of copyright protection to producers of early generations of computer software).

³³⁶ See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT ch. 6 (2004) (outlining alternative system to compensate producers of recorded entertainment, modeled on the Audio Home Recording Act of 1992, whereby funds collected from a levy on the sale of copying tools and blank media would be distributed to creators of recorded entertainment proportionate to the measured popularity of their works online); Breyer, *supra* note 335, at 305–08 (using purchasers’ cooperatives and government subsidies to illustrate alternative financing systems for the production of some presently copyrighted works).

³³⁷ The principle that the public interest demands strict boundaries on the duration of copyright, although ignored by the Congress that enacted the CTEA, is deeply rooted. This passage from Baron Macaulay’s speech in the House of Commons on February 5, 1841 states the issue forthrightly:

It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. *For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.*

The speech is reprinted in 3 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1476 (1994) (emphasis added).

³³⁸ See, e.g., Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1 (2008); Michael J. Madison, *Comment: Where Does*

given that every unit of social resources allocated to provide incentives to creators leaves one less unit available to pursue other goals,³³⁹ and that providing incentives may have both positive and negative effects on expressive output,³⁴⁰ what is the optimal level of creative production that the law should aim to achieve?³⁴¹ None of these questions is *purely* quantitative; each is tightly interwoven with difficult issues of individual preference and social values.³⁴² Yet each question might be illuminated, at least partially, by types of data that remain largely unavailable to contemporary decision-makers.³⁴³

The principle that copyright rules should be based upon facts and evidence about the real-world effects of competing policy choices, rather than psychological suppositions and romantic

Creativity Come From? and Other Stories of Copyright, 53 CASE W. RES. L. REV. 747, 761 (2003) (“Different types or classes of authors may work in systematically different ways, suggesting that copyright’s contours should vary, rather than remaining uniform across time and across all works.”).

³³⁹ See, e.g., Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 655 (1996) (“justifying copyright requires some determination that society will benefit more from devoting additional resources to creating works of authorship than from the alternative investments to which the resources would otherwise have been devoted”).

³⁴⁰ See *supra* note 107 and accompanying text.

³⁴¹ See, e.g., Neil Weinstock Netanel, *Copyright and ‘Market Power’ in the Marketplace of Ideas*, in ANTITRUST, PATENTS AND COPYRIGHT: EU AND US PERSPECTIVES 149, 167–68 (Howard Shelanski & François Lévêque, eds., 2005).

³⁴² Professor Netanel, for example, has described the consequences of copyright restrictions for democratic civil society and articulated an alternative vision that takes seriously the Supreme Court’s description of copyright as the “engine of free expression.” See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347–64 (1996); see also Netanel, *supra* note 341, at 169–71; *supra* note 92 and accompanying text. Professor Netanel’s is a far more attractive vision, it seems to me, than the Supreme Court’s stated view that the public’s interest lies solely in preserving the ability to purchase expressive works in the market. See *supra* note 286 and accompanying text.

³⁴³ As Professor Madison put it:

We need research and analysis that explores not only, “Do we need the incentive of intellectual property law or of copyright in particular?,” but in what ways and by what methods do creators (individuals, firms, other institutions) draw on different resources in the creative process, and what does that tell us about how the relevant legal regime should be structured? We have workable supply-side models of law and creativity. The law declares that it provides incentives of different sorts to create. We need demand-side models, and empirical investigation of their robustness. What kinds of inputs do different kinds of creators need or use? How are works created?

Madison, *supra* note 338, at 762 (footnotes omitted).

moralizing about authorship, arose relatively recently³⁴⁴ and remains controversial.³⁴⁵ Nevertheless, new strands of evidence-based research have begun to appear in the copyright literature.³⁴⁶

For the moment, however, academic research seeking to quantify the likely costs and benefits of policy change in the copyright arena must subsist with a relative paucity of reliable economic data. The development of reliable and impartial information to guide policy going forward is itself apt to prove controversial. Existing copyright law supports highly concentrated, profitable, and politically influential industries³⁴⁷ who derive direct economic benefits from tightening intellectual property protections. Those industries' propensity to over-hype perceived competitive threats has been recognized elsewhere.³⁴⁸ Due to the possibility of bias stemming from institutional self-interest, it is only appropriate to treat industry predictions about the value of the creative industries to the global economy or alleged losses from copyright infringement with some skepticism.³⁴⁹ Lacking unbiased alternative sources of data, however, scholars may have little choice but to rely, at least in part, on self-reported industry statistics.

Separate difficulties attend any attempt rigorously to measure the costs, as opposed to the benefits, of copyright protection. The public's interest in preserving the public domain, although real, may prove resistant to quantification. At present, efforts to measure the economic value of

³⁴⁴ See BLAYNE HAGGART, *COPYRIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM* vii (2014) ("it's a three-hundred-year-old policy and only *now* we're starting to ask for evidence? That's the copyright debate in a nutshell.").

³⁴⁵ See WILLIAM PATRY, *HOW TO FIX COPYRIGHT* ch. 2 (2011) (ridiculing current copyright policy as "faith-based" and calling for a stronger empirical support); see also, e.g., Ivan P.L. Png, *Copyright: A Plea for Empirical Research*, 3(2) REV. ECON. RES. ON COPYRIGHT ISSUES 3 (2006) (identifying several areas where further data need to be developed).

³⁴⁶ See, e.g., JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015); *Symposium: Steps Toward Evidence-Based IP*, 92 TEX. L. REV. 1757 (2014); Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301 (2013); Raymond Shih Ray Ku *et al.*, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669 (2006). Cf. Samuelson *et al.*, *supra* note 110, at 1205–06 (proposing new empirical policy research capabilities and staff for the U.S. Copyright Office).

³⁴⁷ See, e.g., WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 119–20 (2009) (noting very small number of "players" in recorded entertainment industry); HAGGART, *supra* note 344, at 102–03 (noting profitability of content industries and the advantages in access and messaging that their size confers); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (tracing influence of affected industries on drafting of legislation that became the Copyright Act of 1976).

³⁴⁸ See, e.g., Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. TELECOMM. & HIGH TECH. L. 125 (2011); Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 92–93 (1994); *American Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2517–18 (2014) (Scalia, J., dissenting).

³⁴⁹ See, e.g., I.P.L. Png, *On the Reliability of Software Piracy Statistics*, 9 ELEC. COMM. RESEARCH & APPLICATIONS 365 (2010).

copyright's exceptions, such as the fair use doctrine,³⁵⁰ may represent the best proxy for estimating the public's stake in copyright policy; yet those efforts remain in their infancy and their limitations remain readily apparent.

Finally, there is clearly a limit to how far data can take copyright policy. Copyright protection that is either too strong or too weak may prevent some expressive works from coming into existence at all.³⁵¹ Assigning an economic value to a nonexistent work would be a speculative exercise, akin to measuring the height of a building that was never constructed. Furthermore, personal, noncommercial uses of copyrighted works may be culturally very important but are also exceedingly difficult to measure.³⁵² The law's effects on such noncommercial uses, while potentially substantial, may also tend to escape consideration in any quantitative analysis.

B. Explanations Focusing on Congress

To explain the failure of reformist copyright scholarship to exert a similar level of influence on policy as Chicago School writings did on antitrust law, one should also consider the role of Congress. Despite the large role Congress contemplated for the courts in developing substantive copyright law, copyright is governed directly by statutory language to a much greater extent than antitrust law.³⁵³ Thus, it is worth spending a little time examining the possibility that reformist copyright scholarship has exerted limited influence thus far because of its failure to prompt the enactment of new legislative protections for the public domain.

Because copyright law is based on the language of a lengthy and complex statute, perhaps the best hope for copyright reform lies in persuading Congress that greater protections for the public domain are required. Indeed, with the volume of legislative activity rising in the last two years (particularly on the House side, where multiple hearings on copyright revision have been held),³⁵⁴ legislative interest in and attention to copyright issues has reached a height

³⁵⁰ See, e.g., COMPUTER & COMMUNICATIONS INDUSTRY ASS'N, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (2011), at <http://www.ccia.net/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>.

³⁵¹ See *supra* note 107 and accompanying text.

³⁵² See, e.g., Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2006) (noting difficulties of identifying clearly lawful uses under United States law).

³⁵³ Cf. *supra* notes 8–15 and accompanying text. All the controversies sketched out in the preceding section of this article arose in response to the passage of legislation amending the Copyright Act in ways that tended to restrict the public domain. See *supra* Part IV.A.

³⁵⁴ The Register of Copyrights' recent call for statutory revision has kicked off a cycle of subcommittee hearings in the House of Representatives aimed ultimately at crafting new legislation to replace the 1976 Act. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013); Future of Music Coalition, *House Copyright Review Timeline*, at <https://www.futureofmusic.org/article/article/house-copyright-review-timeline> (July 20, 2014).

not seen in decades. Congress is listening. It is worth inquiring, therefore, whether reformist arguments are being advanced in ways that will ultimately foster legislative protections for the public domain.

Although many would-be copyright reformers write for a generalist audience,³⁵⁵ most of the previously referenced literature on copyright and the public domain consists of law review articles.³⁵⁶ Those articles are, in form at least, broadly typical of legal academic writing as a genre: they are lengthy, densely reasoned, heavily footnoted, and stylistically dry. While other scholars value the thoroughness and intellectual rigor of their peers' work, those same qualities may diminish the usefulness of a scholar's work for nonspecialist audiences. A busy legislator (or even a busy staffer) dealing simultaneously with proposals spanning the vast range of subjects addressed by the United States government may have essentially no capacity to absorb an argument, no matter how persuasive, articulated in a fifty-page law journal article.³⁵⁷ To the extent that reformers seek legislative action, other forms of advocacy may serve their arguments better than the continued expansion of the academic literature on the public domain.

Furthermore, efforts to achieve copyright reform through legislation necessarily bring the interests of powerful, self-interested actors to the fore. As Justice Breyer observed in *Golan*, Congress pays disproportionate attention to the interests of copyright industry incumbents who believe themselves to be threatened by any change in the status quo.³⁵⁸ This problem is hardly unique to copyright, of course; defenders of existing policy often enjoy strategic advantages in

³⁵⁵ In this category I would include many of the copyright-related writings of authors such as Lawrence Lessig, Richard Stallman, Siva Vaidhyanathan, Clay Shirky, and Cory Doctorow, to name just a few. Pamela Samuelson writes for both legal scholars and the technology community. William Patry presents a rare example of someone with feet firmly planted on both the "mass audience" and "academic specialist" sides of the divide; he is simultaneously the author of multiple short books advocating for copyright reform as well as the multi-volume *Patry on Copyright* treatise.

³⁵⁶ See generally *supra* notes 75–106 and accompanying text.

³⁵⁷ Cf. FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE ch. 4 (2009) (noting difficulties presented in considering any individual policy proposal stemming from issue complexity and the lack of time or attention available from legislators and staff).

³⁵⁸ *Golan v. Holder*, 132 S. Ct. 873, 907 (2012) (Breyer, J., dissenting) ("Congress, with one minor exception, heard testimony only from the representatives of existing copyright holders, who hoped that passage of the statute would enable them to benefit from reciprocal treatment of American authors abroad"); see also *id.* at 910 (noting that arguments presented to Congress in support of the URAA "directly concern[ed] a private benefit: how to obtain more money from the sales of existing products" rather than "a public benefit, such as how to promote or to protect the creative process."). Perhaps Professor Lessig is correct that the linchpin issue here is the financing of elections; perhaps it is the case that freeing legislators from a virtually all-consuming preoccupation with financing their own campaigns (and the resulting solicitude that they exhibit towards the interests of prospective donors) is the indispensable first step towards refocusing legislative activity on the interests of the broader public. See generally LESSIG, *supra* note 6. At present, members of Congress must devote an inordinate portion of their time to fundraising; solving the election funding problem might also increase the amount of time legislators could spend developing substantive policy expertise. See *supra* note 357 and accompanying text.

resisting change.³⁵⁹ But the massive size and concentrated structure of the industries who benefit from existing copyright law, and the extremely diffuse and amorphous interests of the public who pay copyright's costs, make the contrast especially stark and further reduce the likelihood of remedial legislative action.³⁶⁰

But there is yet another complicating factor for advocates of expanded protections for the public domain. A necessary precondition to meaningful legislative reform is a much broader agreement on a family of basic principles that may then lead to the drafting of compatible statutory text.³⁶¹ There has been little need for legislators to pay attention to the status of the public domain because for most of copyright's history, the public domain was not as threatened as it is today.³⁶² The resulting attitudinal shift among copyright scholars has effectively moved the public domain from a peripheral to a core concern of the law. Replicating that same attitudinal shift among copyright policy-makers will likely be the thorniest obstacle to meaningful legislative revision.³⁶³

³⁵⁹ See BAUMGARTNER ET AL., *supra* note 357, at 81–88.

³⁶⁰ See *id.* ch. 1 (noting that organizations speaking on behalf of ordinary citizens, despite their numbers, suffer from pervasive resource disadvantages compared with organizations speaking for industry needs); see also *supra* note 347 and accompanying text; but cf. *supra* note 350 and accompanying text (noting recent efforts to quantify economic benefits of copyright limitations); PETER BALDWIN, *THE COPYRIGHT WARS* 292–93 (2014) (noting that rising economic importance of technology industry may be beginning to offset content industries' historical advantages in setting copyright policy).

As Baldwin's book illustrates, it is increasingly common in contemporary copyright discourse to assume that the interests of technology companies, broadly speaking, represent an adequate proxy for the interests of the public at large. The public's interest in accessing and using expressive works frequently depends upon the availability of suitable technologies to accomplish that purpose, and technology makers often have a parallel interest in supplying the demand for such tools. For that reason, among others, technology suppliers often find themselves opposing assertions of strong proprietary claims by copyright holders. See, e.g., *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913 (2005); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Of course, the analogy can be pressed too far; where the issue is privacy rather than copyright, for example, no one would assume that the interests of ordinary consumers align with those of technology providers.

³⁶¹ See, e.g., Samuelson *et al.*, *supra* note 110.

³⁶² See *supra* note 74 and accompanying text.

³⁶³ Cf. BAUMGARTNER ET AL., *supra* note 357, ch. 2 (noting that existing policy exerts a form of "friction" that slows policy change until a significant consensus for a new policy emerges).

Another way to import contemporary copyright thinking into Congress would be for copyright scholars to run successfully for public office. There are those of us who would have enjoyed seeing Professor Lessig serve in the House (or even, perhaps, as President), although the question of his electability must wait to be decided another day. See Lawrence Lessig, *On suspending my campaign*, Nov. 3, 2015, at <http://lessig.tumblr.com/post/132425036707/on-suspending-my-campaign>; Julian Sanchez, *Netroots seek to send legal scholar Lessig to Congress*, ARS TECHNICA, Feb. 17, 2008, at <http://arstechnica.com/tech-policy/2008/02/netroots-seek-to-send-legal-scholar-lessig-to-congress/>; Mike Nizza, *Lessig Decides Against Run for*

On the other hand, the revolution in antitrust law tends to undermine the thesis that lasting policy change depends on legislative action. Congress had essentially no role in the changes in antitrust law that were sketched out above. Although some members of Congress (such as Ohio's Senator Howard Metzenbaum) spoke frequently in opposition to what they perceived as antitrust law's growing hospitality toward big business,³⁶⁴ Congressional action during this period was largely limited to passing occasional nonbinding resolutions expressing disapproval.³⁶⁵ The example of antitrust law demonstrates that, even in an area of federal law ultimately governed by statute, lasting policy change can occur despite legislative inactivity. Thus, although there may be a great many things that advocates of stronger protections for the public domain might do to persuade Congress to legislate consistently with their views, it remains an open question whether such action is the best use of reform advocates' time. The lesson for would-be copyright reformers from the history of antitrust law is that the obstacles to legislative revision sketched out above need not doom the broader project to strengthen legal protections for the public domain, although they may require reform advocates to focus their attentions outside Congress.

C. Explanations Focusing on the Executive

Given the obstacles to meaningful legislative revision of copyright law and Congress's lengthy history of enacting ever greater restrictions upon, rather than protections for, the public domain, copyright reform advocates might choose to focus greater attention on executive-branch policymakers. There is unquestionably a rising interest in copyright policy in executive agencies at present, with the Department of Commerce engaged in a lengthy inquiry into how the present structure of the law serves the nation's economic interests.³⁶⁶ The question is whether any of this attention may be directed toward improving protections for the public domain.

Congress at Internet Speed, N.Y. TIMES NEWS BLOG, Feb. 25, 2008, at <http://thelede.blogs.nytimes.com/2008/02/25/lessig-decides-against-run-for-congress-at-internet-speed/>. In general, however, whether inside or outside the realm of intellectual property, there are not many examples of legal scholars directly lobbying Congress (much less seeking elective office themselves) in an effort to have their positions enacted into law.

³⁶⁴ See, e.g., Howard Metzenbaum, *Report from the United States Senate*, 50 ANTITRUST L.J. 133 (1981); Howard M. Metzenbaum, *Is William Baxter Anti-Antitrust?*, N.Y. TIMES, Oct. 18, 1981, archived at <http://www.nytimes.com/1981/10/18/business/is-william-baxter-anti-antitrust.html>.

³⁶⁵ See, e.g., H. Res. No. 303, 99th Cong., 1st Sess., 131 CONG. REC. 35,184–86 (1985) (disapproving of the DOJ Antitrust Division's Vertical Restraints Guidelines as, inter alia, inconsistent with the Supreme Court's decision in *Dr. Miles*, discussed *supra* notes 21, 52 and accompanying text). Cf. also Alan A. Fisher *et al.*, *Do the DOJ Vertical Restraints Guidelines Provide Guidance?*, 32 ANTITRUST BULL. 609, 639–40 (1987) (discussing the same House Resolution as well as political opposition from state attorneys general); Fox & Sullivan, *supra* note 324, at 951–52 (describing legislative resolution aimed at forbidding DOJ from spending money to articulate certain economic views in *amicus curiae* briefs).

³⁶⁶ See INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) (more commonly known as the "Green Paper"), available at

1. Reformist Attitudes Among Executive Officials

The first obstacle to relying on executive action to strengthen the public domain stems from the attitudes of the executive-branch officials with influence over copyright policy. Advocates for copyright reform lack visible representation in the pertinent executive agencies. This situation contrasts markedly with the revolution in antitrust law, which was driven to a substantial degree by changes in enforcement activity at the federal level. Proponents of Chicago School microeconomic analysis were appointed to positions of decision-making authority in the agencies charged with antitrust enforcement, whose subsequent enforcement activity reflected Chicago School principles and priorities.³⁶⁷ To date, would-be copyright reformers have attained no comparable positions of influence in any recent Administration.³⁶⁸ Perhaps the key to replicating the transformation of antitrust law in the realm of copyright is to build awareness among Executive officers and agency staff of the importance of strengthening protections for the public domain, and to appoint similarly minded individuals to positions of policy influence.

Nevertheless, antitrust offers an imperfect parallel. Executive decisions about enforcement play a less prominent role in the making of copyright policy than in antitrust law. Copyright is a form of property right held by an individual author or publisher, and violations of that right ordinarily are vindicated through a private lawsuit against the accused infringer.³⁶⁹ Because antitrust law is a regulatory regime that takes as its goal the efficient operation of markets as a whole, it invites a more significant role for government. The government brings

<http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>. An overview of the Green Paper's research and recommendations is available in Shira Perlmutter, *Making Copyright Work for a Global Market: Policy Revision on Both Sides of the Atlantic*, 38 COLUM. J.L. & ARTS 49 (2014).

³⁶⁷ See, e.g., William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003); Marc Allen Eisner & Kenneth J. Meier, *Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POL. SCI. 269, 273–74 (1990). For a defense of this reorientation of Executive-branch enforcement decisions by one of its architects, see William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1981).

³⁶⁸ To consider only one high-profile example: activist Carl Malamud, the founder of the public.resource.org Web site and one of the lead organizers of the "law.gov" movement, has likely done more than any other single individual to provide free public access to primary legal source materials. For discussions of Malamud's work, see, e.g., Beth Ford, Comment, *Open Wide the Gates of Legal Access*, 93 OR. L. REV. 539, 553–64 (2014). Early in the Obama Administration, Malamud began waging a (in retrospect, quixotic) campaign to be appointed Public Printer of the United States, promising to make public domain federal legal information more accessible online. See Carl Malamud, *Prepared Statement*, archived at <https://yeswescan.org/index.gpo.html> (Mar. 15, 2009). The Obama Administration's decision to overlook public domain advocates such as Malamud may explain why privately organized digitization initiatives have so far outpaced the Government Publications Office at producing high-quality digital archives of public records. See, e.g., Supreme Court of the United States, *Bound Volumes*, at <http://www.supremecourt.gov/opinions/boundvolumes.aspx> (providing scanned copies of slightly over ten percent of the *United States Reports*, the other ninety percent of which are widely available elsewhere online but have never been provided by the Government).

³⁶⁹ See 17 U.S.C. § 501(b) (2012).

more antitrust cases than copyright cases.³⁷⁰ And while there have been pressures for the Administration to take more aggressive enforcement measures against mass infringement,³⁷¹ no Executive-branch agency enjoys as high a profile in the making and enforcement of copyright law as both the Department of Justice and the Federal Trade Commission occupy in antitrust. Even if a new Administration were to commit itself to strengthening legal protections for the public domain through the appointment of sympathetic personnel to positions of policy influence, it is far from clear which offices should be targeted.

2. Copyright's Other Executive Constituencies

There is another problem with relying on Executive officials to lead the effort to improve protections for the public domain that is less easily addressed. The problem here is that the existing structure of copyright law serves other governmental interests beyond merely promoting the creation and dissemination of expressive works. Copyright has other Executive constituencies who may be expected to respond skeptically to any effort to increase protections for the public domain. Addressing the effects of copyright revision on policy objectives that are themselves unconnected with copyright's core purposes may prove to be the most difficult obstacle to reformist arguments.

A comparison with the history of antitrust revision may illustrate the point. Antitrust reform was touted as a response to substantive complaints that excessive enforcement was harming the international competitiveness of key domestic industries (principally by inhibiting the types of economies of scale that were necessary to compete with vertically integrated foreign firms).³⁷² Opinions varied as to whether these concerns were valid or supported the significant

³⁷⁰ For the fiscal year ending September 30, 2014, the United States brought 14 of the 799 civil antitrust cases filed in the federal courts, or just under 2% of the total. This seemingly small number nevertheless represents a far greater ratio than in copyright litigation: of the 4,041 new civil copyright cases filed during the same period, none was brought by the United States. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR (2014), tbl. C-2. On the criminal side, the federal government initiated prosecution of 44 antitrust cases and 35 copyright cases during the same period. *See id.* tbl. D-2. The figures do not account for the role of state attorneys general, who also litigate more frequently in the antitrust field.

³⁷¹ *See, e.g.,* Benton Martin & Jeremiah Newhall, *Criminal Copyright Enforcement Against Filesharing Services*, 15 N.C. J.L. & TECH. 101 (2013) (discussing prosecution of Megaupload site by United States government).

³⁷² *See, e.g.,* Thomas M. Jorde & David J. Teece, *Innovation and Cooperation: Implications for Competition and Antitrust*, 4 J. ECON. PERSP. 75 (1990) (arguing that United States law inhibited forms of efficient inter-firm cooperation that foreign firms used); Malcolm Baldrige, *Two Areas of Antitrust Law in Need of Reform*, 1983 DET. C.L. REV. 1035 (arguing that antitrust law should permit more horizontal collaboration among United States competitors); *see also supra* note 40 and accompanying text.

alterations in antitrust policy that they actually produced,³⁷³ but the point for present purposes is simply that this was in fact the justification that was offered contemporaneously by government officials for reformulating United States antitrust law. This rationale fitted well with existing constituencies in the Executive Branch who sought to promote overseas market access by U.S. firms. Small wonder, then, that some of the most enthusiastic cheerleading for the reorientation of antitrust law came not from antitrust officials at the DOJ and FTC, but from the export-promoting U.S. Department of Commerce.³⁷⁴

The same constituencies who supported revision of the antitrust laws in the name of promoting global trade, however, may resist moves to strengthen the public domain in copyright law. Particularly in view of the United States' long-term trade deficit in goods and services,³⁷⁵ policy makers may view the maintenance of the nation's large trade surplus in intellectual property as a significant policy imperative.³⁷⁶ Because any policy change that lessens the need for the payment of royalties to United States publishers, media companies, software companies, or other IP-intensive industries will have a negative impact on the nation's balance of payments, such changes will invite critical scrutiny from economic policy-makers.

It is not easy to envision how advocates of stronger protections for the public domain will formulate a persuasive response to the objection that reversing the historic trends towards ever-stronger, ever-lengthier copyright protection in the United States will redound to the nation's competitive disadvantage. One answer may be to argue that such international competitive concerns have nothing to do with the core purposes of copyright law (namely, to encourage the creation of new works) and are therefore irrelevant.³⁷⁷ Those core purposes, however, have carried little force in international debates over copyright, where negotiators have been motivated far more by perceived national interests in the costs and benefits of any given

³⁷³ See, e.g., Robert G. Harris & Lawrence A. Sullivan, *Horizontal Merger Policy: Promoting Competition and American Competitiveness*, 31 ANTITRUST BULL. 871 (1986); Donald I. Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16 (1974).

³⁷⁴ See, e.g., Walter Adams & James W. Brock, *Joint Ventures, Antitrust, and Transnational Cartelization*, 11 NW. J. INT'L L. & BUS. 433, 435–36 (1991) (quoting several Commerce Department officials); Baldrige, *supra* note 372.

³⁷⁵ The trade deficit stood at –\$476 billion in 2013, representing a manufacturing deficit of over \$700 billion partly offset by a \$225 billion surplus in services. See generally Bureau of Economic Analysis, U.S. Dep't of Commerce, International Economic Accounts, at <http://www.bea.gov/international/index.htm> (providing data for download in a variety of formats).

³⁷⁶ See, e.g., Lionel Bently, *R. v the Author: From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 57–59 (2008) (recognizing and criticizing the tendency of U.S. copyright policy to focus on export promotion). Diminishing competition in the U.S. market from infringing imports serves the same policy objective, simply from the opposite direction, and is also a longstanding feature of U.S. law. See 17 U.S.C. § 601(a) (2012); *but cf.* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013) (statute's prohibition on infringing imports does not reach copy of work the making of which was lawful under the law of the nation in which it was produced).

³⁷⁷ This is essentially Justice Breyer's position. See *supra* notes 184, 301 and accompanying text.

proposal. Refocusing the international debate on how best to encourage the creation and use of expressive works (concerns that have been influential at the national level) would be a valuable step,³⁷⁸ but one that would require trade negotiators to discard analytical constructs to which they have been long habituated.³⁷⁹ If United States policymakers remain focused on the effects of copyright law on national revenues, then perhaps public-domain advocates should emphasize the potential expansion of expressive output (and the corresponding expansion of possible licensing arrangements) that would occur if more robust protections for the public domain are enacted,³⁸⁰ although this argument would be subject to the same evidentiary difficulties addressed above.³⁸¹ The way forward on this issue is presently unclear. Developing research to counter the concerns of other Executive Branch policymakers who have influence over the direction of copyright law may represent the most challenging imperative for advocates of greater protections for the public domain.

D. Explanations Focusing on the Judiciary

As an alternative to relying on legislative or executive action, copyright reform advocates might continue to focus their attentions on the judiciary. As already noted, however, the outpouring of scholarship on the public domain in the last two decades has yet to exert much of an impact on judicial decisions. The mere production of additional scholarship on the public domain may be a necessary, but clearly not a sufficient, step to achieving more favorable results in actual litigated disputes.

In the antitrust arena, some of the scholars most strongly associated with Chicago School economics received high-profile judicial appointments during the Reagan Administration: Judges Posner and Easterbrook to the Seventh Circuit, and Judge Bork to the D.C. Circuit. At present, at least, advocates for copyright reform cannot claim anything approaching the same level of intellectual influence on the bench. Indeed, even jurists relatively favorably inclined towards protecting the public domain, such as Judge Kozinski and Justice Breyer, occasionally strain to find copyright infringement in dubious circumstances.³⁸² Copyright law necessarily involves

³⁷⁸ Cf. KEITH E. MASKUS, *PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY* 33–35 (2012) (arguing that requiring less-developed nations to meet most-developed nations' standards of IP protection results in overall global levels of protection that exceed the welfare-maximizing level); Gregory N. Mandel, *Leveraging the International Economy of Intellectual Property*, 75 OHIO ST. L.J. 733 (2014) (developing this insight principally from the perspective of patent policy).

³⁷⁹ See *supra* note 116.

³⁸⁰ See, e.g., *supra* notes 78–87 (noting that increasing the scope of the public domain will reduce the cost of creating future expressive works and spur additional creative output).

³⁸¹ Cf. *supra* notes 351–352 and accompanying text.

³⁸² Compare *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (majority opinion of Breyer, J.), with, e.g., Ira Steven Nathenson, *Aereo's Errors*, 2 J. INT'L & COMP. L. 171 (2014); Matthew Sag, *The Uncertain Scope of the Public Performance Right After American Broadcasting Companies v. Aereo, Inc.* (Dec. 19, 2014), available at <http://ssrn.com/abstract=2529047>; Sarah E. Claypool, Comment, *Aereo, Unlicensed*

balancing the interests of putative property owners against those of users of expressive works, of course, and it is not surprising that different decision-makers might strike the balance differently from one case to the next. Nevertheless, the absence of a critical mass of serving judges as well schooled in the body of literature on the public domain as Reagan-era appointees were in law-and-economics literature may explain why the former body of scholarship has proven less influential with the courts.

The antitrust revolution may reveal a good deal about the effect on policy of changes in the composition of the courts. For example, although only ten years elapsed between the Supreme Court's decisions in *Schwinn* and *GTE Sylvania*,³⁸³ only three of the Justices who decided *Schwinn* were still on the Court when *GTE Sylvania* overruled *Schwinn*.³⁸⁴ Although no one would suggest that the world needs more ideological litmus tests for prospective judicial nominees, it is quite clear that judges' viewpoints matter to case outcomes. Efforts to encourage more awareness of the purpose and importance of the public domain among judges and prospective judges, accordingly, appear to represent a desirable step for would-be copyright reformers.

VI. Conclusion

A strong consensus exists among disinterested copyright experts that the structure of existing law excessively restricts the public domain and thereby disserves the public interest. Copyright legislation, treaty-making, and case law, however, have proven remarkably resistant to the insights developed in copyright scholarship on the public domain over the past quarter century. Comparing copyright history with the development of antitrust law reveals that there is

Retransmissions, and Emerging Technologies: The Case for Congressional Action, 100 IOWA L. REV. — (2015, forthcoming), available at <http://ssrn.com/abstract=2490133>; and compare *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (majority opinion of Kozinski, J.), with, e.g., Clark D. Asay, *Ex Post Incentives and IP in Garcia v. Google and Beyond*, 67 STAN. L. REV. ONLINE 37 (Aug. 20, 2014); Paul M. Azzi, Note, *Two Wrongs Don't Make A Copyright: The Dangerous Implication of Granting a Copyright in Performance Per Se*, 83 U. CIN. L. REV. 529 (2014). The full Court of Appeals later rejected Judge Kozinski's decision as an unwarranted expansion of the scope of copyright. *Garcia v. Google Inc.*, 786 F.3d 733, 740–44 (9th Cir. 2015) (*en banc*); cf. *id.* at 749–53 (Kozinski, J., dissenting).

³⁸³ See *supra* notes 25, 48 and accompanying text.

³⁸⁴ Justices William Brennan, Potter Stewart, and Byron White were members of both the *Schwinn* and *GTE Sylvania* Courts, although Justice White did not participate in the decision in *Schwinn*. The other two Justices articulated consistent positions in the two cases: Justice Brennan joined the *Schwinn* majority but dissented in *GTE Sylvania*, and Justice Stewart dissented in *Schwinn* but joined the majority in *GTE Sylvania*.

In the intervening years, however, Chief Justice Warren Burger had replaced Chief Justice Earl Warren; Justice Harry Blackmun had replaced Justice Abe Fortas (who authored *Schwinn*); Justice John Paul Stevens had replaced Justice William O. Douglas; Justice Lewis F. Powell (who authored *GTE Sylvania*) had replaced Justice Hugo Black; Justice William Rehnquist had replaced the second Justice John Marshall Harlan; and Justice Thurgood Marshall had replaced Justice Tom C. Clark.

nothing inevitable about this state of affairs; that insights developed in legal scholarship can and do alter the content of substantive law.³⁸⁵ It is worthwhile to ask, therefore, what is different about copyright law; why the existing structure of the law seems to command so little regard from disinterested scholars whose professional careers revolve around studying copyright, and why lawmakers seem to exhibit dismissive attitudes toward the professional copyright literature. Why do so many of the participants in the copyright ecosystem appear to be talking past one another? The question lacks a single readily apparent answer, although perhaps some of the possible answers developed in the preceding section contain fractional portions of the truth.

For legal scholars, recommendations are difficult to formulate. It would be tempting to conclude that the insularity of scholarly work is the underlying problem here and that scholars must engage more directly with courts and policymakers to have a hope of influencing substantive legal change. It is certainly true that the corpus of scholarly literature on the public domain canvassed above largely avoids addressing thorny “how” questions: how can society ensure that courts make better informed decisions; how can we influence Congress to look beyond the economic interests of the industries whose lobbyists work assiduously to curry their attention and favor when setting policy; how can scholars’ insights best be incorporated into substantive law. Some greater engagement with those sorts of issues might serve would-be copyright reformers’ long-term goals, even if they do not go as far as Professor Lessig and exit the field to focus full-time on campaign finance reform.

On the other hand, scholars have good reasons to shy away from the messy endeavor of real-world policy-making and to treat such “how” questions as outside the purview of legal scholarship. Doing so helps assure readers of legal scholarship that scholars’ views are undistorted by personal bias or a stake in the outcome of the controversies on which they report. Some of the impartiality that I have suggested is important to well-reasoned decision-making is lost if scholars take too prominent a role in the political and judicial process. Drafting books, articles, and perhaps the occasional *amicus* brief is about as close to the process as a legal scholar can get without raising suspicions that one’s scholarship is a mere stalking horse for the interests of one’s clients.

For governmental actors, it is a little easier to speak definitively. No one can make Chief Justice Roberts or Judge Edwards read a law review article if they don’t want to. Their decisions carry the same precedential force either way. Yet proudly trumpeting one’s disengagement from the corpus of professional literature in one’s own field is a poor way to inspire confidence as an informed and impartial decision-maker. Unless law is simply politics, then the views of disinterested experts deserve a fair hearing in any forum that aspires to correctness and legitimacy. The fact that courts and other policymakers have in fact relied on legal scholarship to

³⁸⁵ One might equally well consider how the law of privacy (see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)), or trademark (see Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927)), or many other substantive doctrines developed in response to legal scholars’ arguments. Antitrust supplies a recent, but hardly the only, illustration of this broader point.

undertake far-reaching transformative projects in the past shows, I hope, that law is not simply politics and that ideas matter. Judge Wisdom had it right: decision-makers need to engage with scholarship rather than ignore it.

Whether or not one approves of the results, the reformist antitrust scholarship that emerged a half-century ago undeniably accomplished something tangible: it supplied the basis for wholesale judicial revision of antitrust doctrine to fit better with the scholarly consensus. Understanding why legal change does, or does not, occur in response to evolution in scholarly thinking is a worthwhile exercise for those interested in meaningful copyright reform in the public interest. What distinguishes successful law reform efforts from those that fail? When advocates of greater protections for the public domain develop a robust answer to that question, the benefits to the law and to the public interest will be substantial indeed.